BEFORE

THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

DOCKET NO. 2004-316-C

In re: Petition of BellSouth Telecommunications, Inc.	)
to Establish Generic Docket to Consider Amendments	)
to Interconnection Agreements Resulting from	)
Change of Law	)

BELLSOUTH TELECOMMUNICATIONS, INC.'S POST-HEARING BRIEF

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INTRODUCTION

The Public Service Commission of South Carolina ("Commission") convened this docket in response to a Petition, filed by BellSouth Telecommunications, Inc. ("BellSouth"), requesting a generic docket to address change of law issue arising from various decisions of the Federal Communications Commission ("FCC").[1] Specifically, BellSouth seeks to effectuate the changes in law resulting from the rules the FCC adopted in its *Triennial Review Order ("TRO")*[2] and *Triennial Review Remand Order ("TRRO")*.[3] In general, competitive local exchange carriers ("CLECs") have opposed implementation of these clear federal mandates and associated deadlines. For example, many CLECs refused to accept the FCC's clear statement of national policy that the UNE-P regime is over, filing motions for emergency relief in an effort to evade or delay that policy.[4] These efforts speak volumes about these CLECs' unwillingness to do business in the manner the FCC, following the dictates of Congress and the federal courts, has pronounced.

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[1] See *Order Granting Joint Motion and Adopting Procedural Schedule,* Order No. 2005-343 in Docket No. 2004-316-C at 1 (June 20, 2005).

[2] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), *vacated and remanded in part, aff'd in part, United States Telecom Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004) *("USTA II"), cert. denied*, *NARUC v. United States Telecom Ass'n,,* 125 S. Ct. 313 (2004).

[3] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-290 (FCC rel. Feb. 4, 2005) ("*Triennial Review Remand Order*" or "*TRRO*").

[4] *See, e.g., Order Addressing Petition for Emergency Relief*, Order No. 2005-247 in Docket No. 2004-316-C (August 1, 2005). A number of CLECs that initially opposed these changes have since withdrawn from this docket in whole or in part. For example, AmeriMex withdrew its emergency petition after reaching a commercial agreement with BellSouth. *See* March 21, 2005 letter filed in this docket. KMC withdrew as an intervenor in this docket. *See* June 29, 2005 letter. AT&T, MCI, and Sprint filed letters indicating they would not be participating in the hearing of this case. *See* letters filed on October 10, and 12, 2005. DeltaCom agreed to withdraw all of its witnesses' testimony from the evidentiary record, with the exception of Jerry Watts' testimony regarding Issue 31. And, US LEC withdrew its testimony from the evidentiary record because it reached mutually agreeable language with BellSouth. *See* October 10, 2005 US LEC Motion.

Many CLECs who originally opposed BellSouth in this docket have now entered into commercial agreements with BellSouth,[5] but some continue to fight at all costs to avoid the changes the FCC has implemented at the direction of Congress and the federal courts.[6] Consistent with their campaign of delay and contrary to the purpose of this docket, many CLECs have attempted to avoid the aspects of the law that they do not like by asking the Commission to adopt contract language that is not consistent with the FCC's decisions in the *TRO* and *TRRO*. Instead, their language would perpetuate the very same outdated regulatory regime that the FCC discarded, and would maintain network elements for which the FCC has determined there is no impairment. To support their position, the CLECs continue to make arguments that the FCC, federal courts, and the majority of state commissions already have considered and rejected. The most notable, and demonstrably erroneous, of these arguments is that a state commission can and should dictate the rates, terms, and conditions of BellSouth's Section 271 obligations.

The changes the FCC has required in order to implement the directives of Congress and the federal courts are clear and important. The *TRO* and the *TRRO* confirm that, as a matter of binding federal law, BellSouth is not obligated to provide unbundled access for local circuit switching, certain DS1 and DS3 loops and transport, fiber to the home and fiber to the curb (collectively, "FTTP") loops, hybrid copper-fiber for broadband purposes, entrance facilities, line sharing, dark fiber loops, certain dark fiber transport, and virtually all call-related databases. In the *TRRO*, the FCC expressly prohibited CLECs from obtaining new arrangements for the

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[5] BellSouth's witness Kathy Blake testified that Bellsouth has entered into over 150 commercial agreements through which BellSouth satisfies its Section 271 switching obligation. (Tr. at 113). Some of CompSouth's own member companies have entered into commercial agreements with BellSouth. (Tr. at 539-540; Gillan Deposition at 66). In addition, over 99 CLECs in South Carolina have amended or entered into new Section 252 interconnection agreements that reflect the new unbundling rules regarding elements that remain subject to state commission oversight. (Tr. at 113).

[6] Indeed, CompSouth member IDS Telecom has not attempted to negotiate with BellSouth, and CompSouth members Access Point, Inc. and LecStar Telecom, Inc. have not attempted to negotiate a TRRO amendment, although they apparently have had some negotiations on other issues.

UNEs eliminated by that order (*i.e.*, mass market switching, certain loop facilities, certain transport facilities, dark fiber, etc.) as of the effective date of the order, March 11, 2005. The *TRRO* established a transition period of 12 months (18 months for dark fiber) from March 11, 2005, for moving the embedded base of those former UNEs to alternative arrangements, and it established new, transitional rates for the embedded base of these former UNEs effective as of March 11, 2005. The CLECs are well aware of the FCC's decisions and have had ample time to prepare for this transition.

The starting and ending dates of the FCC's mandatory transition plan does not depend on any particular contract terms. Consequently, none of BellSouth's interconnection agreements had to be amended before implementation of the FCC's prohibition ("No New Adds") on new orders for de-listed UNEs at the start date of the transition period – March 11, 2005. The CLECs fought that inevitable conclusion to the point that in some states in BellSouth's region, the federal courts had to step in to effectuate the law.[7] In South Carolina, the CLECs fought hard to delay implementation of that prohibition, but the Commission ordered that the FCC's clear deadline would stand, over the opposition of several CLECs.[8]

In doing so, the Commission acknowledged that the FCC "signaled an expectation that the parties will move expeditiously away from the specified UNE framework" and "encouraged the state commissions to monitor this area closely to ensure that parties do not engage in

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[7] Commission Orders allowing CLECs to continue ordering de-listed UNEs beyond March 11, 2005 were enjoined by federal courts in Georgia, Mississippi, and Kentucky. *See BellSouth Telecoms. Inc. v. MCI Metro Access Transmission Servs. LLC,* 2005 U.S. Dist. LEXIS 9394 (N.D. Ga. Apr. 5, 2005) ("*Georgia Court Order"*); *BellSouth Telecommunications, Inc. v. Mississippi Public Serv. Com'n. et al.*, Civil Action No. 3:05CV173LN, *Memorandum Opinion and Order* (S.D. Miss. Apr. 13, 2005) ("*Mississippi Order*"), *2005 U.S. Dist. LEXIS 8498l; BellSouth Telecommunications, Inc. v. Cinergy Communications Co., et al.*, Civil Action No. 3:05-CV-16-JMH, *Memorandum Opinion and Order*, (E.D. Ky. Apr. 22, 2005) ("*Kentucky Order*"). The Georgia Court Order recently was affirmed by the Eleventh Circuit Court of Appeals. *See BellSouth Telecoms., Inc. v. MCIMetro Access Transmission Servs., LLC*, 2005 U.S. App. LEXIS 19819 (11th Cir. Ga., Sept. 15, 2005) ("*11th Circuit Order"*).

[8] *Order Addressing Petition for Emergency Relief,* Order No. 2005-247 Docket No. 2004-316-C (Aug. 1, 2005) ("South Carolina No New Adds Order").

unnecessary delay."[9] The Commission stated that it "plans to do so, with the full expectation and goal that the parties will reach new agreements and have procedures in place to transition new and existing services well before the relevant deadlines recognized by this Commission and the FCC."[10] Now, seven months after the Commission announced this decision and with the time when the parties must effectuate the FCC's transition period's mandatory ending date fast approaching, the CLECs continue to raise demonstrably erroneous arguments in an attempt to cling to a regime to which they are not, and never have been, entitled. The ending date of the transition period is just as important as the starting date, and the Commission must act promptly to avoid another round of emergency motions next spring.

Proper implementation of the transition plan, and of all of the remaining unbundling limitations, is of critical public policy importance. CLEC rhetoric predicting diminished competition is flatly contradicted by the FCC's findings. The FCC and courts undeniably have found that overbroad unbundling obligations have hindered the innovation and investment that results from sustainable facilities-based competition.[11] Thus, while the CLECs claim the sky will fall if the changes mandated by the FCC take place, the FCC has already concluded otherwise, undeniably deciding that it was necessary to de-list UNEs to promote real competition. The CLECs have tried to obscure these important legal and regulatory policy decisions, but the Eleventh Circuit Court of Appeals saw through the smoke when it explained that "CLECs are clinging to the former regulatory regime in an attempt to cram in as many new customers as possible before they are forced to bow to the inevitable …."[12]

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[9] *Id.* at p. 11, ¶5.
[10] *Id.*
[11] *See, e.g., TRRO* ¶¶ 2, 8.
[12] *See 11th Circuit Order,* at *13.

Just like they tried to delay the starting date of the transition period, these CLECs are now trying to delay the ending date of the transition period by advancing arguments that would create an unlimited transition period and that would simply replace the rejected federal regulatory scheme with an identical state regulatory scheme, under the guise of Section 271. To the extent existing interconnection agreements perpetuate such out-dated obligations that the FCC eliminated in the *TRO* and *TRRO*, those agreements must be revised – finally – to reflect federal law. To that end, BellSouth has proposed contract amendments that accurately implement the requirements of Section 251 of the 1996 Act and the FCC's implementing rules adopted in the *TRO* and the *TRRO*.[13]

ISSUE BY ISSUE ANALYSIS

I. 271-Related Issues (Overview of Issues 8, 14, 17, 18, 22)

The most contentious, and arguably the most important, issue between the CLECs and BellSouth involves the interplay between Section 271 and de-listed UNEs.[14] This is the common theme for all five of the 271-related issues discussed in Section I of this brief. Stated simply, the CLECs are attempting to coax state commissions to ignore the FCC's national policy decisions and continue the discredited UNE-P regime. The CLECs' proposed contract language and testimony seek to perpetuate UNE-P at a price at least as favorable as they previously had, if not a better price.[15]

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[13] BellSouth requests in this proceeding that, in the Commission's order, it approve *specific contractual language* that can be promptly executed by BellSouth and the CLECs (subject to the individual carrier negotiations, as applicable). While the Commission may need to address policy matters and issue statements of policy in doing so, it is important that this proceeding end with actual contract language in place. BellSouth stands ready to assist the Commission in doing so and has submitted its proposed order with the contract language it asks the Commission to approve.

[14] As used in this Brief, "de-listed UNEs" refers to elements that, as a result of the FCC's decisions, BellSouth is no longer required to offer on an unbundled basis under Section 251 of the federal Act.

[15] (Gillan Deposition at 68). In his deposition, Mr. Gillan claims that, because CompSouth is willing to agree to "interim" 271 rates that are consistent with the transitional rates set in the *TRRO*, he is not actually advocating lower Section 271 prices than Section 251 prices. This is simply disingenuous, given that "interim"

In fact, the CLEC's paid consultant-witness, Mr. Gillan, has openly contended that no matter what the FCC has done, the CLECs should be able to keep UNE-P forever. In his prefiled testimony in Docket 2003-326-C, for instance, he claimed that CLECs were entitled to a Section 271 UNE-P ***indefinitely.***[16] A Section 271 UNE-P, however, is exactly the same arrangement as a "Section 251 UNE-P" that the FCC, federal courts, and this Commission have clearly said BellSouth is not required to provide to CLECs.

As this Commission has noted, "[t]he FCC has determined that the UNE Platform harms competition and thus is contrary to the public interest."[17] The entire 271-based argument, therefore, defies logic, as it would completely undermine the FCC's prior policy findings about the damage the UNE-P has done to competition. Consequently, even if the CLECs were correct in their contention that this Commission can address Section 271 issues or establish Section 271 rates (despite contrary findings by the FCC, federal courts, and numerous State commissions), the Commission should nonetheless support the FCC's decision to end UNE-P – not undermine that decision by creating a surrogate for that rejected regime. The bottom line is that, even if the Commission ***could*** do as the CLECs urge (which it cannot legally, as discussed below), it ***should*** not, for all the same legal, factual, and policy reasons that compelled the FCC to end the UNE-P regime. Significantly, this is not an academic or theoretical discussion about the Commission's jurisdiction. Rather, the CLECs (and their paid consultants) have concocted this argument in an

rates, in the normal sense, are subject to later true up, and Mr. Gillan's belief is that a Section 271 price could be lower than a Section 251 price. At the hearing, Mr. Gillan was quite clear that he believed that FCC's interim rates were "too high." (Tr. at 533). Thus, even if the Commission accepted Mr. Gillian's testimony (which it should not) and applied the FCC's "interim" rates, it would not foreclose CompSouth from seeking a lower rate at some unspecified future date. As explained below, Bellsouth vigorously opposes the establishment of "interim" Section 271 rates.

[16] Surrebuttal Testimony of Joseph Gillan filed on behalf of CompSouth, March 11, 2004, p. 16, lines 8-9. While Mr. Gillan tried to distance himself from this testimony at the hearing (*see* Tr. at 546-547), his testimony states precisely his view that UNE-P must be provided indefinitely.

[17] *Order Addressing Petition for Emergency Relief,* Order No. 2005-247 Docket No. 2004-316-C at 5 (Aug. 1, 2005)

attempt to minimize the impact of the *TRO* and *TRRO* on their business plans. Accepting the CLECs' position would place the Commission squarely at odds with the FCC's decision to ***change*** – not ***perpetuate*** – the regulatory nature of the telecom market in order to incent real, facilities-based competition.

Finally, it would be exceedingly odd for all of the FCC's decisions, deliberations, and conclusions about the adverse impact of the de-listed UNEs on competition under Section 251 of the federal act to be rendered moot by Section 271 of the very same act. Yet that is exactly what the 271 argument is all about – ignoring the FCC's national policy. This disregard for the law renders the CLECs' proposed interconnection agreement language on each of the 271-related issues fatally flawed, and the Commission should reject all such language.

A. **<u>Issue 8(a):</u>** *Does the Commission have the Authority to require BellSouth to include in its interconnection agreements entered into pursuant to Section 252, network elements under either state law, or pursuant to Section 271 or any other federal law other than Section 251?*

<u>Relevant Contract Provisions:</u> PAT-1 Section 1.1 and PAT-2 Section 1.1 (limiting BellSouth's unbundling obligations to those that BellSouth offers to CLECs in accordance with BellSouth's obligations under Section 251(c)(3) of the Act).[18]

1. **<u>State Law</u>**

No CLEC presented testimony suggesting that BellSouth has unbundling obligations under state law that are different from its unbundling obligations under federal law. This is not surprising, because the state statute addressing unbundling obligations expressly states that such obligations "shall be consistent with applicable federal law . . . ."[19] Indeed, in parallel

[18] This Commission admitted into evidence Ms. Tipton's prefiled direct and rebuttal exhibits as one composite exhibit, Hearing Exhibit 8. For ease of reference, BellSouth uses the exhibit identifiers noted in Ms. Tipton's pre-filed testimony in this brief because those references were used in communications and discovery throughout the region.

[19] S.C. Code Ann. §58-9-280(C).

proceedings in other states, the CLECs made clear that they were "not requesting" state commissions to exercise state law authority.[20]

2. <u>Section 271 – Summary of Argument</u>

Faced with the FCC's decision that the UNE-P regime was not providing the right incentives for real facilities-based competition and should end, the CLECs have scrambled to find a way to avoid the business impact of that decision. They have concocted their Section 271 arguments in a last ditch effort to obtain from the state commissions what they were unable to obtain from the FCC and federal courts -- continued access to UNE-P as if nothing has changed. If there were any merit to the notion that all the changes the FCC created in the *TRO* and *TRRO* under one section of the federal act could be wiped away or ignored by reference to another section of the very same act – an act with which the FCC is intimately familiar – then the FCC would surely have saved itself the trouble of all of its work on these issues.

Not only is the 271 argument at odds with the FCC's ultimate and underlying decisions about impairment and competition, it is also unpersuasive as a matter of statutory interpretation. The CLECs' argument on Section 271 starts with language contained within that section, which refers to agreements under Section 252. From that reference, the CLECs concoct an argument that ***presumes*** that because state commissions arbitrate and approve ***Section 251*** obligations in the context of a Section 252 agreement, they must take similar steps concerning Section 271.

This argument cannot withstand logical scrutiny because, although Section 271 refers to Section 252, the simple fact is that Section 252 explicitly ***limits*** the rate-setting and arbitration powers of state commissions to ***Section 251*** elements. This express limitation precludes the

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[20] *See* October 21, 2005 Joint CLEC Post-Hearing Brief, filed in Georgia Docket No. 19341-U; October 28, 2005 Joint CLEC Post-Hearing Brief, filed in Tennessee Docket No. 04-00381.

Commission from requiring BellSouth to include Section 271 elements in a Section 252 agreement.

The CLECs are asking the Commission to impermissibly read one portion of the statute but ignore the remainder. Section 252 never refers to Section 271, yet it contains express references to Section 251. The CLECs want to ignore this express limitation, inexplicably claiming that"[i]t is immaterial that § 252 does not refer to § 271 . . . ."[21] The Commission, however, cannot and should not ignore the plain language of the statute. The Section 252 rate-setting, negotiation, arbitration, and approval process clearly is limited to Section 251 obligations, and it cannot legitimately be read to extend to the separate and distinct obligations set forth in Section 271.

It is not as if the FCC just forgot about 271. Rather, the FCC discussed its role on these issues in the *TRO*, explaining that

> [w]hether a particular checklist element's rate satisfies the just and reasonable pricing standard of Section 201 and 202 is a fact-specific inquiry ***that the [FCC] will undertake*** in the context of a BOC's application for [S]ection 271 authority or [once authority has been granted] in an enforcement proceeding brought pursuant to Section 271(d)(6).[22]

Indeed, when the FCC first addressed the interplay between section 251(c) and the competitive checklist network elements of section 271 in its *UNE Remand Order,* the FCC was very clear that "the prices, terms, and conditions set forth under sections 251 and 252 do not presumptively apply to the network elements on the competitive checklist of section 271."[23] The FCC has also

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[21] *CompSouth's Response to BellSouth's Motion for Summary Judgment or Declaratory Ruling and CompSouth's Cross-Motion for Summary Judgment and Declaratory*, filed in Docket 2004-316-C, July 18, 2005, p. 8 ("CompSouth's SJ Response").

[22] *TRO* ¶ 665. (emphasis added).

[23] *Third Report and Order and Fourth Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, ¶ 469 (1999) ("*UNE Remand Order*"), *petitions for review granted, Unites Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003). The Commission very clearly stated that

stated that, once long distance authority has been granted, "[S]ection 271(d)(6) grants the [FCC] enforcement authority to ensure that the BOC continues to comply with the market opening requirements of [S]ection 271."[24] The FCC made no mention whatsoever of a state commission role in this process; the regulatory agency charged with Section 271 oversight is the FCC.[25]

Despite these clear pronouncements by the FCC, the CLECs' primary witness claims the ***only*** way that BellSouth can satisfy its Section 271 obligations is through a state-approved interconnection agreement or an SGAT.[26] This claim is contrary to the weight of authority, which confirms that the FCC has ***exclusive*** oversight over Section 271 obligations. As explained below, federal courts in Kentucky, Mississippi, and Montana, and state commissions in Alabama, Arkansas, Idaho, Iowa, Kansas, Massachusetts, Minnesota, New York, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, and Washington have addressed Section 271. These decisions have all concluded, in some fashion, that the FCC is charged with Section 271 authority.

Finally, the CLECs' proposed contract language and positions do not reflect reality. The FCC has explained that unbundling at cost-based rates is only required in situations where CLECs are genuinely impaired without access to particular network elements. When unbundling is not required, it means that a market is "suitable for competitive supply" and that "competition

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> [i]f a checklist network element is unbundled, the applicable prices, terms and conditions are determined in accordance with Sections 251 and 252. If a checklist network element does not satisfy the unbundling standards in Section 251(d)(2), the applicable prices, terms and conditions for that element are determined in accordance with Sections 201(b) and 202(a).

UNE Remand Order at 470.

[24] *TRO* ¶ 665.

[25] *See also TRO* at ¶ 663. ("The Supreme Court has held that the last sentence of section 201(b), which authorized the [FCC] 'to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act,' empowers the [FCC] to adopt rules that implement the new provisions of the Communications Act that were added by the Telecommunications Act of 1996. Section 271 is such a provision.") (citations omitted).

[26] Gillan Deposition pp. 60 – 61.

is possible" without access to UNEs.[27] Likewise, courts have recognized that unnecessary unbundling imposes unnecessary costs.[28] In practical terms, the CLECs' positions and proposed language in this proceeding simply extend the transitional pricing of the *TRRO* indefinitely, and retains all other terms and conditions for de-listed UNEs.[29] However, where unbundling is not required but Section 271 access is required, the terms of independent Section 271 access are imposed under "less rigid accompanying conditions."[30] De-listing means that CLECs can and should compete using alternative, market-based arrangements, rather than under a state-imposed Section 271 regime that is designed to mirror the Section 251 framework, which is what CompSouth advocates.

After more than a decade of synthetic competition, the Commission must ensure that the transition to sustainable facilities based competition is unhampered by CLEC created hurdles aimed at extending indefinitely a specified transition period. BellSouth explains more fully below each of these points.

3. Issue 8(a): There Is No Legal Basis For A State Commission To Force BellSouth to Include Section 271 Network Elements In A Section 252 Interconnection Agreement.

Contrary to CompSouth's position, a state commission's authority to arbitrate Section 252 agreements is limited ***to ensuring the contracts comply with Section 251***. The Act provides

[27] *USTA II,* 359 F.3d at 571.

[28] *Id.* at 572; *USTA I,* 290 F.3d at 428.

[29] CompSouth's witness, Mr. Gillan, is quite explicit on this point, claiming "the Commission should require that § 271 offerings should be identical – except as to price – to the § 251 offerings they replace." Tr. at 458. Concerning price, Mr. Gillan alleges that § 271 prices are "potentially" different. *Id.* at 451. CompSouth glibly suggests that the FCC's transitional rates could serve as "interim" § 271 pricing, until an undetermined future time, relying on a Missouri Order that is the subject of an active appeal in federal district court. *See Southwestern Bell Telephone, L.P. d/b/a SBC Missouri v. Missouri Public Service Commission,* Case No. 4:05-CV-01264-CAS, United State District Court, Eastern District of Missouri. Setting aside the numerous deficiencies with Mr. Gillan's arguments, BellSouth does not agree that "interim" Section 271 rates are either legitimate or acceptable. In this regard, the Ninth Circuit vacated and remanded a district court order that denied Verizon's preliminary injunction request to set aside interim TELRIC rates in *Verizon Cal., Inc. v. Peevey*, 413 F.3d 1069 (9th Cir. 2005). Moreover, the Commission lacks authority to set such rates as explained herein.

[30] *TRO* at ¶ 658.

that when BellSouth receives "a request for interconnection, services, or network elements ***pursuant to Section 251***," it is obligated to "negotiate in good faith ***in accordance with Section 252*** the particular terms and conditions" of agreements that address those Section 251 obligations.[31] Thus, interconnection agreements address Section 251 obligations, and those obligations are the ***only topics that are required to be included in a Section 252 interconnection agreement***. The resulting agreements are submitted to state commissions for approval under Section 252(e). A state commission's authority is explicitly limited to those agreements entered into "pursuant to Section 251" and, when arbitration occurs, state commissions must ensure that agreements "meet the requirements of Section 251."[32]

Consequently, upon receiving a request for "network elements pursuant to section 251," an ILEC may negotiate and enter into an agreement voluntarily, or an ILEC may enter into an agreement after compulsory arbitration.[33] An ILEC, however, is ***not required*** to negotiate, in the context of a Section 252 agreement, any and all issues CLECs may wish to discuss, such as access to elements ILECs may be required to provide under Section 271. Without doubt, an ILEC may voluntarily agree to negotiate things that would normally be outside the purview of its Section 251 obligations. When it does so, such matters may properly be considered by the state commissions under prevailing law. However, where an ILEC chooses not to negotiate more than is required by Section 251, that is its right, and it cannot be forced to do more. BellSouth has steadfastly refused to negotiate the inclusion of Section 271 elements in Section 252 agreements and there was no testimony or record evidence that suggested otherwise here. Consequently, the interconnection agreement amendments that result from this proceeding must be limited to Section 251 obligations.

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[31] 47 U.S.C. § 251(c)(1).
[32] 47 U.S.C. § 252(e)(2)(B).
[33] 47 U.S.C. § 252(a), (b).

The law is quite clear that Section 251 obligations form the basis of Section 252 agreements. As the Eleventh Circuit has recognized, "[t]he scheme and text of [the Act] … lists only a limited number of issues on which incumbents are mandated to negotiate."[34] The Fifth Circuit also recognized this distinction, explaining that ***"[a]n ILEC is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act when a CLEC requests negotiation pursuant to § 251 and 252."***[35] Congress, therefore, did not grant state commissions any authority to arbitrate compliance with the requirements of Section 271. That decision resolves this issue – state commissions have authority to arbitrate Section 252 agreements, but only so far as such agreements comply with Section 251. BellSouth, therefore, simply is not required to include Section 271 obligations in Section 252 agreements.

4. Issue 8(a): Section 252 Limits State Commission Rate-Setting Authority to Section 251 Elements.[36]

The CLECs' purpose in arguing for the Commission to engage in 271 rate-setting is to avoid precisely what the FCC has set in motion – a move away from commission rate-making and toward market negotiation. The bottom line on all of the 271-related arguments is the common-sense reality that if the CLECs were to prevail on this argument, then the CLECs will have effectively used the Commission to override the FCC's decisions about market-based, real competition. That simply cannot be the right answer.

Despite the express limitations contained in Section 252, the CLECs in this case suggest the Section 252 negotiation, arbitration, and approval process applies equally to Section 251

[34] *MCI Telecom. Corp. et al. v. BellSouth Telecommunications, Inc. at al.,* 298 F.3d 1269, 1274 (11th Cir. 2002).

[35] *Coserv Limited Liability Corp. v. Southwestern Bell Telephone Co.,* 350 F.3d 482, 488 (5th Cir. 2003). (emphasis added.)

[36] Although Issue 8(b) also addresses rate-setting for Section 271 that sub-issue presumes that the answer to the threshold question – does a state commission have authority to require BellSouth to include Section 271 network elements in a Section 252 interconnection agreement – is affirmative. As BellSouth explains herein the answer is negative in all respects, including rate-setting.

elements and Section 271 elements. This suggestion is misplaced. CompSouth ignores that ***there is no language in Section 252 that refers to Section 271***. Congress allowed states to "set" rates only "for the purposes of subsection (c)(3) of such Section [251]" and to arbitrate agreements to "ensure that such resolution and conditions meet the requirements of Section 251 . . . ."[37]

State commissions have no authority to set rates for Section 271 elements. This is clear because the language in Section 252 limits state commission rate-setting authority to Section 251 elements. Section 252(d)(1) provides that state commissions may set rates for network elements ***only*** "for purposes of subsection (c)(3) of such Section [251]." The FCC has stated that this Section "is quite specific in that it only applies for the purposes of implementation of Section 251(c)(3)" and "does not, by its terms" grant the states any authority as to "network elements that are required under Section 271."[38] This express limitation in Section 252(d)(1) on state commission pricing authority in arbitrations cannot be blindly brushed aside by the CLECs.

Even if there could be any legitimate question about how to read these statutes, the FCC has already answered the question. In addition to the express language of Section 252, the FCC has confirmed that Section 251's pricing standards (over which the state commissions have authority) do not apply to checklist elements under Section 271.[39] It "clarif[ied] that the FCC will determine whether or not the applicable pricing standards are met," either in the context of a Section 271 application for long distance authority or, thereafter, in an enforcement proceeding.[40] The FCC plainly stated that "[w]hether a particular checklist element's rate satisfies the just and reasonable pricing standard of Sections 201 and 202 is a fact-specific

[37] 47 U.S.C. § 252(d)(1) and 47 U.S.C. § 252(c)(1).
[38] *TRO* at ¶ 657.
[39] *TRO,* at ¶¶ 662, 664.
[40] *Id.*

inquiry that the [FCC] will undertake in the context of a BOC's application for Section 271 authority or [once authority has been granted] in an enforcement proceeding brought pursuant to Section 271(d)(6)."[41]

Finally, the FCC held that "[w]here there is no impairment under Section 251 and a network element is no longer subject to unbundling, we look to ***Section 271*** and elsewhere in the Act to determine the proper standard for evaluating the terms, conditions, and pricing under which a BOC must provide the checklist network elements."[42] The FCC went on to hold that "[s]ection 252(d)(1) provides the pricing standard 'for network elements for purposes of [Section 251(c)(3)], and does not, by its terms, apply to network elements that are required only under Section 271."[43]

The FCC has further held that the rates for Section 271 elements are subject to the standard set forth in Sections 201 and 202 – statutes applied and enforced by the FCC.[44]Courts, moreover, uniformly have held that claims based on Sections 201(b) and 202(a) are within the FCC's jurisdiction. Section 201(b) speaks in terms of "just and reasonable" rates, and those are determinations that "Congress has placed squarely in the hands of the [FCC]."[45] As the D.C.

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[41] The FCC further explains that BellSouth might meet its burden of proof in such a proceeding by demonstrating that the rate for a Section 271 element is at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff, to the extent such analogues exist. Alternatively, a BOC might demonstrate that the rate at which it offers a Section 271 network element is reasonable by showing that it has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate.

TRO at ¶ 664. As Ms. Blake made clear, BellSouth has entered into over 150 commercial agreements. Tr. at 113 (Blake Rebuttal at 3). Ms. Blake also explained that BellSouth satisfies its 271 obligations to provide de-listed loops and transport through its special access and private line tariffs. *Id.*

[42] *TRO* at ¶ 656 (emphasis added).

[43] *Id.* at ¶ 657 (brackets in original).

[44] *See TRO* at ¶¶ 656; 664 ("Whether a particular checklist element's rate satisfies the just and reasonable pricing standard of Section 201 and 202 is a fact-specific inquiry that the [FCC] will undertake …."); also *TRO* at ¶ 665 ("In the event a BOC has already received Section 271 authorization, Section 271(d)(6) grants the [FCC] enforcement authority to ensure that the BOC continues to comply with the market opening requirements of Section 271.").

[45] *In Re: Long Distance Telecommunications Litigation,* 831 F.2d 627, 631 (6th Cir. 1987) (quoting *Consolidated Rail Corp. v. National Association of Recycling Industries, Inc.*, 449 U.S. 609, 612 (1981)); *see also*

Circuit has noted, Sections 201(b) and 202(a) "authorized the [FCC] to establish just and reasonable rates, provided that they are not unduly discriminatory."[46] The idea of FCC regulation of local telephone service under Sections 201 and 202 is neither problematic nor novel. The Supreme Court has determined that Congress "unquestionably" took "regulation of local telecommunications competition away from the State" on all "matters addressed by the 1996 Act" and required that state commission regulation be guided by FCC regulations.[47]

The CLECs will likely contend that while the FCC spoke of itself as the "regulator" in charge of compliance with the Section 271 just and reasonable standard, "[i]t did not, however, establish itself as the agency in charge of arbitrating the rate levels when they are in dispute."[48] The distinction the CLECs may attempt to draw is one without a difference. It is merely an excuse for continuing to rely on commissions to set rates rather than participating in market-based negotiation.

The entity charged with "regulating" the rates (which in this case the CLECs admit is the FCC) is by definition the entity that must resolve the issue when the rates "are in dispute." Starting from a presumption of old-style, pre-competition rate-setting, the CLECs assume that a regulatory body must set the rates in the first instance, but that is not the case in today's competitive market. Instead, the provider sets the rates in accordance with the just and reasonable standard, and the ***FCC*** resolves any disputes that arise surrounding those rates.[49] In a

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Total Telecommunications Services Inc. v. American Telephone & Telegraph Co., 919 F. Supp. 472, 478 (D. D.C. 1996) (FCC has primary jurisdiction over claims that telecommunications tariffs or practices are not just or reasonable), *aff'd.*, 99 F.3d 448 (D.C. Cir. 1997).

[46] *Competitive Telecommunications Association v. FCC*, 87 F.3d 522, (D.C. Cir. 1996),

[47] *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378 n. 6 (1999); *Indiana Bell Telephone Company, Inc. v. Indiana Utility Regulatory Commission*, 359 F.3d 493 (7th Cir. 2004).

[48] *See, e.g., CompSouth's SJ Response* at 32.

[49] CompSouth has implied that BellSouth's ability to change its special access prices requires state commission action under Section 271. CompSouth is wrong. While the FCC did not accept ILECs' arguments concerning the availability of special access as an alternative to UNEs in situations in which CLECs are impaired (*see, e.g., TRRO* at ¶ 59), when Section 251 UNEs are no longer available "a competitor is not impaired in its ability

competitive market, regulators should not step in until there is a need, but the CLECs want the regulators to step in and over-ride the market that has produced both intermodal competition and more than 150 negotiated commercial agreements between CLECs and BellSouth.

The FCC is right to treat Section 271 elements differently. It makes sense that the FCC rules regarding Section 271 elements (*i.e.,* that the provider can set the rate initially as opposed to the regulator) are – and should be – less stringent than those under Section 251. Section 251(b) and (c) set forth the provisions that Congress deemed essential to the development of local competition and without which a CLEC is legally "impaired" within the meaning of Section 251(c)(1). Congress thus ensured that state commissions have authority to arbitrate the rates, terms and conditions of access to these elements. ***Conversely, the FCC has determined that CLECs are not impaired without access to Section 271 elements that no longer meet the Section 251 test.*** The FCC's conclusions cannot – and should not – be brushed aside. The FCC has reached these conclusions. It has done so based on an evidentiary finding that competitive alternatives for such elements are readily available in the marketplace.[50] Congress did not subject access to these 271 elements to the same regulatory scrutiny. Rather, consistent with Congress's overriding intent to "reduce regulation," parties should be allowed to contract freely as to those items.[51]

To make their case, the CLECs ignore all of the express limitations on state commission authority in Section 252 and the relevant case law; instead, they rely almost exclusively on

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to offer services without access to that element" and it would be "counterproductive to mandate that the incumbent offers the element at forward-looking prices. Rather, the market price should prevail, as opposed to a regulated rate …." *UNE Remand Order* at ¶ 473. Indeed, in the *TRRO* the FCC clearly contemplated that CLECs could transition to special access services and commercial agreements. *TRRO* at ¶¶ 142, 195, 228.

[50] *See e.g., UNE Remand Order* at ¶ 471 (where a checklist item is no longer required under Section 251, a competitor is "not impaired in its ability to offer services without access to that element," which can be "acquire[d] … in the marketplace at a price set by the marketplace.").

[51] *Id.* Under these circumstances, the FCC concluded that "it would be counterproductive to mandate that the incumbent offer[] the element" at forward looking prices." Instead, "the market price should prevail, as opposed to a regulated rate".

Section 271(c)(1)'s reference to "agreements that have been approved under Section 252."[52] By its terms, however, that Section expressly refers *only* to "approv[al]" of agreements under Section 252. ***It says nothing about state commission arbitration or rate-setting authority.*** The limitations on rate-setting and arbitration are directly relevant here because the CLECs want the Commission to arbitrate issues around, and set rates for, the Section 271 elements. The issue before the Commission, therefore, goes far beyond the scope of the Commission's authority to approve agreements, yet that is the extent of the statutory provision in Section 271 upon which the CLECs rely.

Just as the Commission is bound to heed the General Assembly's limits on its jurisdiction, the FCC (and the state commissions when the FCC or Congress delegates duties to them) must heed carefully the words of Congress. The CLECs' argument utterly disregards the words that expressly limit state rate-setting authority. Crucially, Congress made no mention of including Section 271 elements in negotiations under Sections 251(c)(1) and 252(a)(1), arbitration under Section 252(b), or state commission resolution of open issues under Section 252(c). Most importantly for present purposes, Congress did not give state commissions ***any*** rate-setting authority for Section 271 requirements in Section 252(d)(1). To the contrary, ***all*** of those Sections are explicitly linked – and limited – to implementation of Sections 251(b) and (c).

Mr. Gillan also suggests that Section 271(c)(1) means that "checklist items [must] be offered through interconnection agreements approved under Section 252 of the Act. "[53] Section 271(c)(1) says nothing of the sort. Section 271(c)(1) provides that to comply with Section 271, a BOC must meet the requirements of either subparagraph (A) or (B). Subparagraph (A), in turn,

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[52] Tr. at 454.
[53] Tr. at 454; Gillan Deposition at 60.

provides that a BOC meets the requirements of the Section if it "has entered into one or more binding agreements that have been approved under Section 252 …." The reference to Section 252 agreements refers to agreements that incorporate the required Section 251 elements – nothing is said about Section 271 elements. Section 271(c)(1) only requires approved Section 252 agreements or an SGAT to obtain Section 271 authority; it does not require Section 271 elements incorporated into Section 252 agreements (nor would it, because such a requirement would conflict with the express limitations in Section 252 addressed above).

5. **Issue 8(a): The FCC Has Exclusive Authority Over the Enforcement of Section 271 Elements.**

States have no authority to regulate access to network elements provided pursuant to Section 271, including any attempt to require the inclusion of Section 271 elements in a Section 252 interconnection agreement. Section 271 vests authority in the ***FCC*** to regulate network elements provided pursuant to that section. Thus, to obtain long distance relief, a BOC may apply to the ***FCC*** for authorization to provide such services, and the ***FCC*** has exclusive authority for "approving or denying" the requested relief.[54] Once a BOC obtains Section 271 authority (as BellSouth has throughout its region), continuing enforcement of Section 271 obligations rests solely with the FCC under Section 271(d)(6)(A) of the Act.

The FCC made clear in the *TRO* that the prices, terms, and conditions of Section 271 checklist item access, and a BOC's compliance with them, are within the FCC's exclusive purview in the context of a BOC's application for Section 271 authority or in an enforcement proceeding brought pursuant to Section 271(d)(6).[55] Section 271 vests authority exclusively in

[54] 47 U.S.C. § 271(d)(1),(3).

[55] *See TRO* at ¶ 664 ("Whether a particular checklist element's rate satisfies the just and reasonable pricing standard of section 201 and 202 is a fact-specific inquiry that the [FCC] will undertake ...."); also *TRO* at ¶ 665 ("In the event a BOC has already received section 271 authorization, section 271(d)(6) grants the [FCC] enforcement

the FCC to "regulate" network elements provided pursuant to that section and for which no impairment finding has been made.[56] The role that Congress gave the state commissions in Section 271 is a consultative role during the Section 271-approval process.[57] State commissions' authority to approve interconnection agreements entered into "pursuant to section 251," to impose arbitrated results under Section 251(c)(1) in order to ensure that any agreements "meet the requirements of section 251," and to set rates under Section 252 "for purposes of" the interconnection and access to network elements required by 251(c)(2) and (c)(3) are specifically limited by the terms of the statute to implementing Section 251 obligations, not Section 271 obligations. Moreover, the FCC refused to graft Section 251 pricing and combination requirements onto Section 271 in its *TRO*,[58] a decision upheld by the *USTA II* court, which characterized the cross-application of Section 251 to Section 271 as "erroneous."[59] In sum, Section 252 grants state commissions authority only over the implementation of Section 251 obligations, not Section 271 obligations.[60]

Congress could have specified that states have authority to establish the rates, terms, and conditions for purposes of the competitive checklist under Section 271, but it did not do

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authority to ensure that the BOC continues to comply with the market opening requirements of Section 271"). Nothing in *USTA II* or in the *TRRO* disturbed this FCC ruling.

[56] 47 U.S.C. § 271. For example, Section 271(d)(1) provides that to obtain interLATA relief, a BOC "may apply to the [FCC] for authorization to provide interLATA services." Congress gave the FCC the exclusive authority for "approving or denying the authorization requested in the application for each State." 47 U.S.C. §271(d)(3). "It is," the Commission has determined, "the [FCC's] role to determine whether the factual record supports a conclusion that particular requirements of 271 have been met." *Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208, *Memorandum Opinion and Order*, 13 FCC Rcd 539, 555, ¶ 29 (1997). And once a BOC obtains Section 271 authority (as BellSouth has in each of the 9 states in which it provides telephone service), continuing enforcement of Section 271 obligations, by the express terms of the statute, rest solely with the FCC. 47 U.S.C. § 271(d)(6).

[57] 47 U.S.C. § 271(d)(2)(B).

[58] *TRO* at ¶¶ 656 – 664.

[59] *USTA II*, 359 F.3d at 590.

[60] *See also MCI Telecomm. Corp.*, 298 F.3d at 1274 (requirement that ILEC negotiate items outside of Section 252 is "contrary to the scheme and the text of that statute, which lists only a limited number of issues on which incumbents are mandated to negotiate."); *and* 47 U.S.C. §§ 251(b), (c) (setting forth the obligation of all local exchange carriers and incumbent local exchange carriers, respectively).

so. That choice must be respected. As the FCC has explained, Congress intended that a single federal agency, not 51 separate bodies, exercise "exclusive authority" over "the Section 271 process."[61] In the D.C. Circuit's words, Congress "has clearly charged the FCC, and not the State commissions," with assessing BOC compliance with Section 271.[62] The Act contemplates a single federal arbiter of compliance with Section 271, including reviewing the rates, terms, and conditions imposed by that section.

If there is an issue of whether BellSouth is meeting its Section 271 obligations through approved agreements or otherwise, Congress was explicit as to what body should address whether BellSouth is in compliance. Section 271(d) authorizes the FCC, not state commissions, both to approve 271 applications and to determine post-approval compliance. If the CLECs are concerned about BellSouth's Section 271 compliance, the place to raise that concern is the FCC, not with a state commission. In the FCC's words, that federal agency has ***"exclusive Commission"*** over the entire "Section 271 process."[63]

The CLECs have previously attempted to distinguish what they concede to be the FCC's exclusive enforcement authority over Section 271 from what they call the state commission's Section 252 authority.[64] The obvious flaw in the CLECs' argument is that, as demonstrated above, Section 252 does not confer any jurisdiction over Section 271 elements to the state commissions – in fact, it expressly limits state commission authority to set rates and arbitrate to ***Section 251*** obligations.

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[61] *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions to Consolidate LATAs in Minnesota and Arizona*, NSD-L-97-6, *Memorandum Opinion and Order*, 14 FCC Rcd 14392, 14401, ¶ 18 (1999) ("*InterLATA Boundary Order").*

[62] *SBC Communications Inc. v. FCC*, 138 F.3d 410, 416-17 (D.C. Cir. 1998).

[63] Memorandum Opinion and Order, *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions to Consolidate LATAs in Minnesota and Arizona,* 14 FCC Rcd 14392, 14401-02, ¶ 18 (1999) (emphasis added).

[64] *See, CompSouth's SJ Response* at 30.

Furthermore, the arrangement advocated by the CLECs would be unworkable as a practical matter. Under the CLECs' argument, Section 252 interconnection agreements would contain both Section 251 and 271 elements. The CLECs concede, however, that the state commission has no enforcement authority over Section 271 elements.[65] Thus, under the CLECs' theory, state commissions would enforce certain parts of an interconnection agreement (*i.e.*, the 251 elements) and the FCC would enforce other parts (*i.e.,* the 271 elements) of the same contract. That scenario, of course, makes no sense.[66]

6. Issue 8(a): Federal Decisions and State Commission Decisions Confirm the FCC's Exclusive Authority Over Section 271 Elements.

Despite federal decisions and state commission decisions, CompSouth contends that the Commission has the authority to make BellSouth include its Section 271 obligations in Section 252 interconnection agreements. As outlined above, however, CompSouth ignores completely that interconnection agreements result from a Section 251 request and are evaluated to ensure compliance with Section 251. Indeed, decisions from Washington to Mississippi demonstrate that state commissions have no Section 271 regulatory authority.

a. Federal Court Decisions

Three recent federal decisions address this issue. First, on appeal from a decision from the Mississippi Public Service Commission, the United States District Court explained:

> Even if § 271 imposed an obligation to provide unbundled switching independent of § 251 with which BellSouth had failed to comply, § 271 explicitly places enforcement authority with the FCC, which may (i) issue an order to such company to correct the deficiency; (ii) impose a penalty on such company ... or

[65] *See CompSouth's SJ Response* at 29 ("CompSouth does not contend that if the Section 271 checklist items are not in the ICA that the Commission has the enforcement authority to revoke BellSouth's long distance entry or otherwise sanction BellSouth").

[66] It is also inconsistent with the FCC's statements in the *UNE Remand Order* that "*the prices, terms, and conditions* set forth in sections 251 and *252* do not presumptively apply to the network elements on the competitive checklist of section 271." *UNE Remand Order* at ¶ 469 (emphasis supplied).

> (iii) suspend or revoke such company's approval to provide long distance service if it finds that the company has ceased to meet any of the conditions required for approval to provide long distance service. Thus, it is the prerogative of the FCC, and not this court, to address any alleged failure by BellSouth to satisfy any statutorily imposed conditions to its continued provision of long distance service.[67]

Second, the United States District Court in Kentucky confirmed:

> While the defendants also argue that the Act places independent obligations for ILECs to provide unbundling services pursuant to § 271, this Court is not the proper forum to address this issue in the first instance. The enforcement authority for § 271 unbundling duties lies with the FCC and must be challenged there first.[68]

Third, on June 9, 2005, a federal district court in Montana held that Section 252 did not authorize a state commission even to approve a negotiated agreement for line sharing between Qwest and Covad. It reasoned that Section 252 did not apply to this "commercial agreement" because line sharing "is not an element or service that must be provided under Section 251."[69] This decision squarely conflicts with Mr. Gillan's contention that, under Section 271(c)(2)(A), Section 271 elements ***must*** be contained in a Section 252 interconnection agreement.[70] That is because if a state commission cannot even approve a negotiated agreement that does not involve Section 251 items, it certainly cannot ***arbitrate*** terms that are not mandated by Section 251, where, as discussed above, Congress expressly limited the state commissions' authority to implementing Section 251.

[67] *BellSouth Telecommunications, Inc. v. Mississippi Public Serv. Com'n. et al.*, Civil Action No. 3:05CV173LN, *Memorandum Opinion and Order* (S.D. Miss. Apr. 13, 2005) ("*Mississippi Order*"), *2005 U.S. Dist. LEXIS 8498*, p. 17 of slip opinion.

[68] *BellSouth Telecommunications, Inc. v. Cinergy Communications Co., et al.*, Civil Action No. 3:05-CV-16-JMH, *Memorandum Opinion and Order*, (E.D. Ky. Apr. 22, 2005) ("*Kentucky Order*"), p. 12 of slip opinion; The foregoing decisions are consistent with *Indiana Bell v. Indiana Utility Regulatory Com'n et al.,* 359 F.3d 493, 497 (7th Cir. 2004) (*"Indiana Bell"*), in which the Seventh Circuit described a state commission's role under Section 271 as "limited" to "issuing a recommendation." Consequently, when the Indiana Commission attempted to "parlay its limited role in issuing a recommendation under section 271" into an opportunity to issue an order, ostensibly under state law, dictating conditions on the provision of local service, the Seventh Circuit preempted that attempt.

[69] *Qwest Corp. v. Schneider, et al.*, 2005 U.S. Dist. LEXIS 17110, CV-04-053-H-CSO, at 14 (D. Mont. June 9, 2005).

[70] Tr. at 452 (Gillan Direct at 43).

b. State Commission Decisions

In addition to the foregoing federal decisions, a significant number of state commissions have given proper effect to the federal statutory scheme. Notably, there are a series of arbitration decisions directly on point outside of BellSouth's region involving one of CompSouth's members, Covad, in which the question of whether a state commission can include Section 271 obligations in Section 252 interconnection agreements has been answered "no" time and again. Moreover, in cases involving Covad and other CompSouth members, state commissions from Kansas, Massachusetts, Pennsylvania, Texas, and Rhode Island have also addressed this issue directly. Other state commissions have also confirmed the FCC, rather than state commissions, is charged with Section 271 oversight, although these cases do not specifically address the inclusion of Section 271 obligations in Section 252 interconnection agreements. The relevant decisions are detailed below.[71]

Washington Utilities and Transportation Commission

The Washington Utilities and Transportation Commission ("Washington Commission") explained that "state commissions do not have authority under either Section 271 or Section 252 to enforce the requirements of Section 271."[72] With respect to Section 252 in particular, the Washington Commission found that even if the parties agreed to negotiate the issue of including Section 271 elements in a Section 252 arbitration proceeding (which BellSouth has not done), the parties could ***not*** confer state commission authority over this exclusively federal aspect of the Act. Thus, the Washington Commission held that

> requiring Qwest to include Section 271 elements in the context of arbitration under Section 252 would conflict with the federal regulatory scheme in the Act, as

[71] Of the state commission orders referenced in this section, the CLECs have appealed the Texas order referenced herein, and various parties have appealed orders preceding the Pennsylvania decision cited below.

[72] *In re: Petition for Arbitration of Covad with Qwest,* Docket No. UT-043045, Order No. 06 (Feb. 9, 2005), *2005 Wash. UTC LEXIS 54*. Hereinafter "Washington Covad/Qwest Decision."

> Section 271 of the Act provides authority only to the FCC and not to state commissions.[73]

Utah Public Service Commission

In an analogous arbitration proceeding, the Utah Public Service Commission ("Utah Commission") held that "Section 252 was clearly intended to provide mechanisms for parties to arrive at interconnection agreements governing access to the network elements required under Section 251. Neither Section 251 nor 252 refers in any way to Section 271 or state law requirements, and certainly neither section anticipates the addition of new Section 251 obligations via incorporation by reference to access obligations under Section 271 or state law."[74] The Utah Commission reasoned that

> Section 271 on its face makes quite clear that the FCC retains authority over the access obligations contained therein. Furthermore, Section 271 elements are distinguishable from Section 251 elements precisely because the access obligations regarding these elements arise from separate statutory bases. The fact that under a careful reading of the law the Commission may under certain circumstances impose Section 271 or state law obligations in a Section 252 arbitration does not lead us to conclude that it would be reasonable in this case for us to do so.[75]

Iowa Utilities Board

The Iowa Utilities Board issued a similar ruling on May 24, 2005. That commission acknowledged a state commission has only "a consulting role" in addressing Section 271. The Iowa commission concluded it lacked "jurisdiction or authority to require that Qwest include [Section 271] elements in an interconnection agreement arbitration brought pursuant to § 252."[76]

Idaho Public Utilities Commission

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[73] Washington Covad/Qwest Decision, 2005 *Wash. UTC LEXIS* *38.

[74] *In re: Petition for Arbitration of Covad with Qwest,* Utah Public Service Commission Docket No. 04-2277-02 (Feb. 8, 2005), *2005 Utah PUC LEXIS 16* ("Utah Covad/Qwest Decision").

[75] *Id.*

[76] *In re: Petition for Arbitration of Covad with Qwest,* Iowa Utilities Board, Docket No. ARB-05-1 (May 24, 2005), *2005 Iowa PUC LEXIS 186.* ("Iowa Covad/Qwest Decision").

On July 18, 2005, the Idaho Public Utilities Commission entered its arbitration order between Covad and Qwest in Case No. CVD-T-05-1.[77] The Idaho Commission concluded "that the Commission does not have the authority under Section 251 or Section 271 of the Act to order the Section 271 unbundling obligations as part of an interconnection agreement."[78]

South Dakota Public Service Commission

The South Dakota Public Service Commission acted in a consistent manner, finding it

> does not have the authority to enforce Section 271 requirements within this section 252 arbitration. Section 252(a) provides that interconnection negotiations are limited to requests for interconnection, services, or network elements pursuant to section 251 …. In addition ... section 252(c)(1) requires the Commission to ensure that [its] resolution of open issues meet the requirements of section 251 of this title, including the regulations prescribed by the FCC pursuant to section 251 of this title …. The language in these sections clearly anticipates that section 252 arbitrations will concern section 251 requirements, not section 271 requirements.[79]

Oregon Public Utility Commission, Minnesota Public Utilities Commission

On September 6, 2005, the Oregon Public Utility Commission adopted an arbitrator's decision, which found, in relevant part, that:

> Every state within the Qwest operating region that has examined [the Section 271] issue has done so in a thoughtful, thorough and well-reasoned manner. In each case, the agency with the authority to review the Covad/Qwest ICA dispute has found that there is no legal authority requiring the inclusion of Section 271 UNEs in an interconnection agreement subject to arbitration under Section 251 of the Act, and [the Oregon Commission] adopt[s] the legal conclusions that they all hold in common ....[80]

The Oregon Commission expressly adopted the following legal conclusions reached by an arbitrator and confirmed by the Minnesota state commission:

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[77] Order No. 29825; *2005 Ida. PUC LEXIS* 139

[78] Hereinafter "Idaho Covad/Qwest Decision."

[79] *In re: Petition for Arbitration of Covad with Qwest,* South Dakota Public Service Commission Docket No. TC05-056 (July 26, 2005), *2005 S.D. PUC LEXIS 137 (* "South Dakota Covad/Qwest Decision").

[80] *In re: Petition for Arbitration of Covad with Qwest,* Oregon Public Utility Commission, Order No. 05-980, ARB 584 (Sept. 6, 2005), *2005 Ore. PUC LEXIS 445* ("Oregon Covad/Qwest Decision").

> There is no legal authority in the Act, the *TRO,* or in state law that would require the inclusion of section 271 terms in the interconnection agreement over Qwest's objection ... both the Act and the *TRO* make it clear that state commissions are charged with the arbitration of section 251 obligations, whereas the FCC has retained authority to determine the scope of access obligations pursuant to section 271.[81]

Pennsylvania Public Utility Commission

In addition to the arbitration decisions between Covad and Qwest, other state commissions have issued similar rulings on Section 271. On June 10, 2005, the Pennsylvania Commission ruled Verizon was not obligated to file state tariffs including its Section 271 obligations because:

> [T]he enforcement responsibilities of Section 271 compliance lies with the FCC. Therefore, the Commission will not oblige Verizon PA to produce tariff amendments that reflect its Section 271 obligations. However, the Commission will continue to monitor Verizon PA's compliance with its Section 271 obligations and, if necessary, initiate appropriate complaint proceedings before the FCC. [82]

Massachusetts Department of Telecommunications and Industry

On July 14, 2005, the Massachusetts Department of Telecommunications and Industry entered its Arbitration Order in Docket No. D.T.E. 04-33. The Massachusetts Commission held that

> our authority to review and approve interconnection agreements under § 252 does not include the authority to mandate that Verizon include § 271 network elements in any of its § 252 interconnection agreements.[83]

[81] The Minnesota Public Service Commission issued its Order Resolving Arbitration Issues in Docket No. P-5692, 421/IC-04-549 on March 14, 2005 in which it adopted, in part, the December 16, 2004 Arbitrator's Report in that docket.

[82] *Pennsylvania Public Utility Commission v. Verizon Pennsylvania Inc., et al;* R-00049524; R-00049525; R-00050319; R-00050319C0001; Docket No. P-00042092, 2005 Pa. PUC LEXIS 9 (June 10, 2005). In the Pennsylvania decision, the Commission referred to various appeals of prior orders pending the United States District Court, Middle District of Pennsylvania. ("Pennsylvania Tariff Decision").

[83] *In re: Petition of Verizon New England, Inc. d/b/a Verizon Massachusetts for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order,* D.T.E. 04-33, Arbitration Order (July 14, 2005). ("Massachusetts Arbitration Order").

Kansas Corporation Commission

The Kansas Corporation Commission entered its Order No. 15: Commission Order on Phase II UNE Issues addressing a prior recommendation of an arbitrator in Docket Nos. 05-BTKT-365-ARB et al., 2005 Kan. PUC LEXIS 867 on July 18, 2005.[84] In relevant part, the Kansas Commission held that "the FCC has preemptive jurisdiction over 271 matters."[85]

Public Utility Commission of Texas

On June 17, 2005, the Texas Commission issued an order in which it declined to include terms and conditions for provisioning of UNEs under Section 271 in an interconnection agreement. The Texas Commission explained that it

> declines to include terms and conditions for provisioning of UNEs under FTA § 271 in this ICA. The Commission finds that the FTA provides no specific authorization for the Commission to arbitrate Section 271 issues; § 271 only gives states a consulting role in the 271 application approval process.[86]

Rhode Island Public Utilities Commission

The Rhode Island Commission addressed Section 271 in connection with proposed tariff changes made by Verizon. In a July 28, 2005 order in Docket No. 3662, *In re: Verizon-Rhode Island's Filing of February 18, 2005 to Amend Tariff No. 18,*[87] that commission rejected CLEC attempts to include obligations arising under "applicable law" such as Section 271 in Verizon's wholesale tariff. The commission explained "Section 271 is a federal statute and it is inherently logical to have the FCC interpret the statute." The Rhode Island Commission concluded that "[a]t this time, it is apparent to the Commission that at the bistro serving up the BOCs' wholesale obligations, the kitchen door numbered 271 is for 'federal employees only.'"

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[84] Hereinafter "Kansas Order."

[85] *See Kansas Order,* at 6.

[86] Arbitration Order, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement, Texas P.U.C. Docket No. 28821* (June 17, 2004) ("Texas Order"). The Texas Order has been appealed to the United States District Court, Western District of Texas.

[87] Hereinafter "Rhode Island Order."

Arkansas

The Arkansas Commission addressed Section 271 in an October 31, 2005 *Memorandum Opinion and Order*. In relevant part, the Commission acknowledged "this Opinion will not attempt to resolve Section 271 issues because they are not subject to arbitration under Section 252 of the Act." Likewise, it recognized that "ICA arbitrations are limited to establishing the rates, terms and conditions to implement the obligations of 47 U.S.C. 251. This Commission's obligations under Section 271 of the Act are merely advisory to the FCC."[88]

Alabama, North Carolina, New York

In addition to the foregoing decisions, other state commissions have addressed Section 271 obligations more generally. For example, the Alabama Commission has also concluded that the responsibility for overseeing BellSouth's obligations under Section 271 remains with the FCC, not the Commission. In an order in Docket No. 29393, which involved a petition filed by CompSouth – a party to these proceedings – seeking emergency relief in connection with the "No New Adds" controversy, the Alabama Commission said:

> With regard to MCI's argument that BellSouth has an independent obligation to provision UNE-P switching pursuant to § 271 of the Telecommunications Act of 1996, we conclude, as did the court in [the *Mississippi Order*, infra n. 14], that given the FCC's decision "to not require BOCs to combine § 271 elements no longer required to be unbundled under § 251, it (is) clear that there is no federal right to § 271 based UNE-P arrangements. This conclusion is further bolstered by the fact that the ultimate enforcement authority with respect to a regional Bell operating company's alleged failure to meet the continuing requirements of § 271 of the Telecommunications Act of 1996 rests with the FCC and not this Commission. MCI's argument that there is an independent obligation under § 271 to provide UNE-P is accordingly rejected.[89]

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[88] *Memorandum Opinion and Order,* October 31, 2005, *In re: Petition of Southwestern Bell Telephone L.P. d/b/a SBC Arkansas for Compulsory Arbitration of Unresolved Issues for Successor Interconnection Agreement to the Arkansas 271 Agreement,* Docket No. 05-081-U

[89] *Order Dissolving Temporary Standstill And Granting In Part And Denying In Part Petitions For Emergency Relief*, Alabama Public Service Commission Docket No. 29393 (May 25, 2005) ("May 25, 2005 Order"), at p. 18 (footnotes omitted) ("Alabama No New Adds Order").

In Docket P-55, Sub 1550, the North Carolina Commission, when considering various emergency petitions concerning the recent "No New Adds" controversy, addressing a claim from MCI seeking 271 based UNE-P said:

> MCI argued that Section 271 independently supported its right to obtain UNE-P from BellSouth. BellSouth denied this, saying that while it is obligated to provide unbundled local switching under Section 271, such switching is not required to be combined with a loop, is subject to the exclusive jurisdiction of the FCC, and is not provided via interconnection agreements. The Commission does not believe that there is an independent warrant under Section 271 for BellSouth to continue to provide UNE-P.[90]

Likewise, the New York Commission recognized that "[g]iven the FCC's decision to not require BOCs to combine 271 elements no longer required to be unbundled under section 251, it seems clear that there is no federal right to 271-based UNE-P arrangements."[91]

All of these decisions, which hold that it is the FCC that has jurisdiction over matters related to Section 271 elements, are obviously correct as a matter of law. States have no authority to regulate access to network elements provided pursuant to Section 271, including any attempt to require the inclusion of Section 271 elements in a Section 252 interconnection agreement. Section 271 vests authority in the FCC to regulate network elements provided pursuant to that section. Congress could have specified that states have authority to establish the rates, terms, and conditions for purposes of the competitive checklist under Section 271, but it did not do so. That choice must be respected. As the FCC has explained, Congress intended that a single federal agency, not 51 separate bodies, exercise "exclusive authority" over "the Section 271 process."[92] In the D.C. Circuit's words, Congress "has clearly charged the FCC, and not the

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[90] *Order Concerning New Adds,* North Carolina Utilities Commission, Docket No. P-55, Sub 1550, April 25, 2005, at p. 13 ("North Carolina No New Adds Order").

[91] *See also Ordinary Tariff Filing of Verizon New York Inc. to Comply with the FCC's TRO on Remand*, New York Public Service Commission Case No. 05-C-0203 (March 16, 2005) ("New York Order").

[92] Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions to Consolidate LATAs in Minnesota and Arizona, NSD-L-97-6, *Memorandum Opinion and Order*, 14 FCC Rcd 14392, 14401, ¶ 18 (1999) ("*InterLATA Boundary Order").*

State commissions," with assessing BOC compliance with Section 271.[93] The Act contemplates a single federal arbiter of compliance with Section 271, including reviewing the rates, terms, and conditions imposed by that section. Moreover, in light of *USTA II,* it is obvious that when Congress assigns a certain responsibility to the FCC, the FCC, and not state commissions, must make the relevant determinations.

Decisions Previously Relied Upon by CompSouth Are Clearly Distinguishable

CLECs have previously cited to dicta contained in a one federal case – *Qwest Corporation v. Minnesota Public Service Commission,* 2004 WL 1920970 (D. Minn. 2004) – as support for the claim that Section 271 elements belong in Section 252 agreements. That decision, however, is clearly distinguishable because the FCC, ruling on the same fact pattern, reached a different conclusion about Section 252 in the *Qwest ICA Order*. In the *Qwest ICA Order*, the FCC found that "***only*** those agreements that contain an ongoing obligation relating to Section 251(b) or (c) must be filed under [Section] 252(a)(1)."[94] The FCC reiterated this interpretation throughout the Order, noting that while "a settlement agreement that contains an ongoing obligation relating to Section 251(b) or (c) must be filed under Section 252(a)(1)," "settlement contracts that ***do not affect an incumbent LEC's ongoing obligations relating to Section 251 need not be filed***."[95] This finding is consistent with the FCC's Notice of Apparent Liability for Forfeiture against Qwest for failing to file interconnection agreements and provisions containing and relating to Section 251(b) and (c) obligations.[96] More importantly, the

[93] *SBC Communications Inc. v. FCC*, 138 F.3d 410, 416-17 (D.C. Cir. 1998).

[94] *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, Memorandum Opinion and Order, 17 FCC Rcd 19337, n. 26 (2002) ("Qwest ICA Order") (emphasis added).

[95] Qwest ICA Order, ¶ 12 (emphasis added); *see also Id*, ¶ 9 (only those "agreements addressing dispute resolution and escalation provisions relating to the obligations set forth in Sections 251(b) and (c)" must be filed under Section 252).

[96] *See Qwest Corporation*, *Apparent Liability for Forfeiture, Notice of Apparent Liability for Forfeiture*, File No. EB-03-IH-0263, FCC 04-57 (2004).

Qwest Corp. v. Minnesota Public Service Commission case predates the 2005 federal court decisions in Mississippi, Kentucky, and Montana.

CompSouth also attempted previously to distinguish the recent federal decisions in Kentucky and Mississippi on this issue – any such attempt should be rejected by the Commission. Both the Kentucky and Mississippi courts specifically held that decisions regarding 271 obligations rested with ***the FCC***.[97] An attempt by a state commission to set rates or terms and conditions for Section 271 elements would directly conflict with federal court precedent.

In terms of state commission authority, CompSouth's witness cited to a July 11, 2005 arbitration order from the Missouri Public Service Commission.[98] The Missouri decision has been appealed to United States District Court, Eastern District of Missouri; indeed, the CLECs ***agreed*** to the entry of a preliminary injunction which ***prevented*** CLECs from adding new switching arrangements under purported Section 271 Commission.[99]

To the extent that CompSouth relies in its post-hearing brief on decisions from Tennessee, Maine, Oklahoma, Illinois, and Michigan, such reliance is misplaced. BellSouth filed a preemption petition before the FCC after the Tennessee Regulatory Authority's vote, but before the 2-1 written Tennessee vote was memorialized into a written decision, which written order was released on October 20, 2005. BellSouth has recently filed a motion asking the Tennessee Regulatory Authority to reconsider its 2-1 written decision. In addition, the Tennessee Regulatory Authority has acknowledged since the issuance of that order that the FCC

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[97] *Mississippi Order*, p. 17 of slip opinion; *Kentucky Order*, p. 12 of slip opinion.

[98] *See* Tr. at 457 (Gillan Direct at 48).

[99] *See* Sept. 9, 2005, Preliminary Injunction Order, *Southwestern Bell Telephone, L.P. d/b/a SBC Missouri v. Missouri Public Service Commission,* Case No. 4:05-CV-01264-CAS, ¶ 1 (the "PSC's July 11, 2005 Arbitration Order as well as related orders approving interconnection agreements ... are hereby enjoined to the extent they require SBC Missouri to fill new orders for unbundled local switching or UNE-P pursuant to the Federal Telecommunications Act of 1996").

"could provide clarification regarding state authority for 271 elements." Docket No. 04-00186, Order dated July 20, 2005 at p. 7. Also, Verizon has appealed the Maine decision; SBC Illinois has appealed the Illinois decision, the Oklahoma commission has apparently delayed taking action on an arbitrator's decision that CompSouth has cited to previously, and the Michigan Commission rejected the Joint CLECs language concerning 271.[100]

B. <u>Issue 8(b): Section 271 and State Law:</u> *If the answer to part (a) is affirmative in any respect, does the Commission have the Authority to establish rates for such elements?*

<u>Relevant Contract Provisions:</u> PAT-1 Section 1.1; PAT-2 Section 1.1

As explained above, state commissions have no authority in any respect to force BellSouth to include Section 271 network elements or network elements unbundled under state law in Section 252 interconnection agreements. Consequently, if the Commission gives proper effect to the existing limitations on its authority under federal law, this sub-issue is easily addressed – the Commission need not discuss it at all. Moreover, for all the reasons discussed above, even if the Commission ***could*** legally set rates, it ***should*** not. Engaging in commission-driven rate setting would be flatly inconsistent with the FCC's decisions in the *TRO* and *TRRO*.

It is important to recognize that Section 271 rate-setting has particular legal ramifications. That is, even if a state commission were to construe Section 271 as requiring an agreement to be

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[100] *See, e.g., Verizon New England Inc. v. Public Utilities Commission of Maine et al.,* Case No. 1:05-CV-53 (U.S. Dist. Ct. D. Me). There are two appeals pending against orders of the Illinois Commission, *Illinois Bell Telephone Co. v. Edward C. Hurley et al.,* Case No. 05-C-1149 (U.S. Dist. Ct. E.D. Ill.), and an appeal to the appellate court of the Fourth Judicial District. BellSouth believes the latter appeal may be the direct appeal of the case cited in the *CompSouth's SJ Response,* p. 15. Most recently, CompSouth cited to a September 20, 2005 Illinois decision as favorable to it. Any such citation in this case would be incomplete. The Illinois Commission recognized that it "has no jurisdiction to enforce the provisions of Section 271 absent an agreement." Illinois Commerce Commission Docket No. 05-0442, Arbitration Decision, November 2, 2005, p. 60. The Illinois Commission has previously exercised limited 271 authority based upon explicit contractual provisions in which SBC made reference to Section 271 elements in interconnection agreements. BellSouth has not done so here. In Michigan, the Commission found "that the disputed language proposed by both parties [addressing Section 271] should not be included in the amendment" because "[t]hose obligations may be argued and decided at a different time and in a more appropriate proceeding." Order, p. 15, Case No. U-14447, Michigan Public Service Commission, Sept. 20, 2005. In addition, in CompSouth's Georgia brief, it implied the Vermont Commission had issued a favorable 271 decision without providing a citation to an actual order. BellSouth believes this is incorrect.

approved by a state commission under Section 252, the scope of that state commission approval is expressly limited to ensuring agreements comply with ***Section 251*** and, state commissions clearly have no authority to establish rates for such elements, which underscores that state commissions have no authority to require inclusion of the Section 271 elements to begin with.

Section 271 "establish[es] a comprehensive framework governing Bell operating company (BOC) provision of 'interLATA service'" and, as shown above, provides only an extremely limited role for state commission participation within that framework.[101] In addition, section 271 arose out of the Modification of Final Judgment (MFJ),[102] and "the states had no jurisdiction" over the implementation of the MFJ.[103] And the FCC has already ruled that it is ***federal*** law – namely, sections 201 and 202 – that established the standard that BOCs must meet in offering access to 271 elements.[104]

State commissions, therefore, cannot assert state law authority to regulate Section 271 elements, which "are a purely federal construct."[105] In particular, state commissions cannot rely on state law to expand the list of Section 271 elements or to regulate the rates, terms, and conditions under which BOCs must provide access to those elements.

The FCC has held that, in Section 271, Congress identified a limited set of specific network elements to which BOCs must provide access irrespective of whether their competitors would be impaired without access to those elements as UNEs.[106] Congress also expressly prohibited the FCC from "extend[ing] the terms used in the competitive checklist" to include

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[101] *E.g.*, Memorandum Opinion and Order, *Petition of SBC Communications for Forbearance,* 19 FCC Rcd 5211, ¶ 7 (2004).

[102] *see TRO* at ¶ 655 *at* n. 1986,

[103] *InterLATA Boundary Order,* 14 FCC Rcd 14392, 14401, ¶ 16.

[104] *See TRO* at *¶* 656; *UNE Remand Order* at ¶ 470; *USTA II, 359 F.3d* at 588-90.

[105] *InterLATA Boundary Order,* 14 FCC Rcd 14392, 14401, ¶ 18.

[106] *See TRO* at ¶ 653.

additional network elements.[107] It necessarily follows that any decision by a state commission purporting to create new Section 271 obligations under state law or to regulate them in any way, including setting rates, conflicts with Congress's determination and, therefore, is preempted.[108]

More generally, any efforts by state commissions to regulate the prices of Section 271 elements are preempted because they are inconsistent with the FCC's determination (affirmed by the D.C. Circuit) that Sections 201 and 202 establish the standard for assessing the rates, terms, and conditions under which BOCs must provide access to 271 elements.[109] As the FCC has explained, this means that, for Section 271 elements, "the market price should prevail."[110] Thus, a BOC satisfies that federal law standard when it offers Section 271 elements at market rates, terms, and conditions, such as where it has entered in "arms-length agreements" with its competitors.[111] Rate-setting by commissions is the opposite of the development of market-based prices discussed in the *USTA II* decision. The two concepts of "market-based" rates on the one hand and "commission-set" rates on the other, are fundamentally at great odds, and if this commission ignored the work that BellSouth has done to reach commercial agreements it would undermine such efforts going forward.

Moreover, the failure by certain CLECs to reach an agreed upon rate – in contravention of the FCC's calls for commercial agreements – should not be rewarded. By engaging in any form of state-based, Commission-run rate making, the CLECs are rewarded with the same out-dated regulatory regime rejected by the FCC.

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[107] 47 U.S.C. § 271(d)(4); *see also* 47 U.S.C. § 160(a), (d) (permitting the FCC to eliminate the obligation to provide Section 271 elements once "it determines that th[e] requirements [of section 271] have been fully implemented").

[108] *See, e.g. Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 353 (2001)*; *International Paper Co. v. Ouellette,* 479 U.S. 481, 494 (1987).

[109] *See TRO* at ¶ 656; *UNE Remand Order* at ¶ 470; *USTA II,* 359 F.3d at 588-90.

[110] *UNE Remand Order* at ¶ 470; *USTA II,* 359 F.3d at 588-90.

[111] *TRO* at ¶ 664.

Permitting "state law to determine the validity of the various terms and conditions agreed upon" by BOCs and their wholesale customers "will create a labyrinth of rates, terms and conditions" that "violates Congress's intent in passing the Communications Act."[112] This potential for "patchwork contracts" resulting from "the application of fifty bodies of law" "… conflicts with Section 202's prohibition on providing advantages or preferences to customers based on their 'locality.'"[113] Section 201, moreover, "demonstrates Congress's intent that ***federal law*** determine the reasonableness of the terms and conditions" of 271 elements.[114]

The FCC has clearly recognized this limitation, stating unequivocally that it has "exclusive authority" over "the section 271 process."[115] Moreover, clear precedent establishes that the FCC has the power to preempt state determinations where a facility is used both for interstate and intrastate purposes and it is not practicable to regulate those components separately.[116] As the FCC has stated to the Supreme Court, that analysis applies directly to the pricing of facilities that must be provided by ILECs under the 1996 Act. The FCC explained to the Court that it had concluded in the *Local Competition Order* that

> it would be economically and technologically nonsensical ... for the FCC and the state commissions to treat the rates for interconnection with and unbundled access to [ILEC] facilities like retail rates, such that the ultimate rate a competing carrier

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[112] *Boomer v. AT&T Corp.,* 309 F.3d 404, 420 (7th Cir. 2002); *see also TRO* at ¶ 664 (question whether BOC's provision of Section 271 element satisfies sections 201 and 202 requires "a fact-specific inquiry").

[113] *Boomer,* 309 F.3d at 418-19.

[114] *Id.* at 420 (emphasis added).

[115] *See US West Order*, 14 FCC Rcd at 14401-02, ¶ 18.

[116] *See Louisiana PSC v. FCC*, 476 U.S. 355, 375 n.4 (1986); *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 114-15 (D.C. Cir. 1989); *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036, 1045-46 (4th Cir. 1977) ("NCUCII"). *See also Memorandum Opinion and Order and Notice of Inquiry*, WC Docket No. 03-251, released March 25, 2005 ("*DSL Preemption Order")* (The FCC recently described its preemption power, explaining, in paragraph 19, that "in addition to section 251(d)(3) jurisdiction in the 1996 Act, Congress accorded to the [FCC] direct jurisdiction over certain aspects of intrastate communications pursuant to section 251 of the 1996 Act …. We conclude that the plain language of section 251 and of the *Triennial Review Order* empowers the [FCC] to declare whether a state commission decision is inconsistent with or substantially prevents implementation of the Commission's unbundling rules.")

> must pay an incumbent LEC would reflect a combination of an 'intrastate' rate set by a state commission and an 'interstate' rate set by the FCC.[117]

Accordingly "***the [FCC] may ensure effective regulation of the interstate component ... by preempting inconsistent state regulation of the matter in issue***."[118] The Supreme Court agreed that the FCC had the authority to resolve such matters under the 1996 Act and thus to "draw the lines to which [state commissions] must hew."[119]

This limitation on state rate-making authority must be given effect. If Congress had wanted state commissions to set rates for "purposes of subsection (c)(3) of such section [251]" ***and*** separately for purposes of the competitive checklist contained in subsection (c)(2)(B) of section 271, it could easily have said so. It said nothing of the kind. As the FCC has explained in a related context involving the relationship between Sections 251 and 271, "Congress' decision to omit cross-references [is] particularly meaningful" in this context, given that such cross-references are plentiful elsewhere in the relevant provisions.[120]

Indeed, ***nowhere*** in the federal statute are states authorized to impose any obligations, much less to set rates, to ensure compliance with section 271 – a provision that, as the FCC and the D.C. Circuit have emphasized, contains obligations that are independent of section 251.[121] Rather, as confirmed by the ***limited*** authority granted to the states by section 252, all authority to implement those separate requirements in section 271 is vested with the FCC.

Therefore, even if state commissions had authority to require ILECs to include Section 271 elements in an Section 252 interconnection agreement (which they do not), the state

[117] *Opening Brief for the Federal Petitioners*, FCC v. Iowa Utils. Bd., No. 97-831, at 36-37 (U.S. filed Apr. 3, 1998) ("FCC S. Ct. Brief").
[118] *Id.* at 36 (emphasis added).
[119] *Iowa Utils. Bd.*, 525 U.S. at 378 n.6.
[120] *TRO* ¶ 657.
[121] *See Id.* at 17385-86, ¶ 655 ("section 251 and 271 ... operat[e] independently"); *USTA II*, 359 F.3d at 588 ("The FCC reasonably concluded that checklist items four, five, six, and ten imposed unbundling requirements for those elements independent of the unbundling requirements imposed by §§ 251-52.").

commissions, as a matter of law, have no authority to set rates for those elements. Perhaps most importantly, the Commission, even if it ***could***, ***should*** not be fooled into accepting the CLECs' invitation to set rates that the FCC has decided should be set by the market.

C. Issue 8(c): Section 271 *If the answer to 8(a) or (b) is affirmative in any respect,(i) what language, if any, should be included in the ICA with regard to the rates for such elements; and (ii) what language, if any, should be included in the ICA with regard to the terms and conditions for such elements?*

Relevant Contract Provisions: PAT-1 Section 1.1; PAT-2 Section 1.1

Based upon the language in the Act, the applicable federal court decisions, and the majority of state commission decisions, there is no basis whatsoever to require BellSouth to include language addressing Section 271 obligations in Section 252 interconnection agreements over BellSouth's objection. BellSouth's proposed contract language properly recognizes that its unbundling obligations are performed "in accordance with its obligations under Section 251(c)(3) of the Act."[122] Because the Commission cannot legally answer issues 8(a) and (b) in the affirmative, this subpart (c) must be resolved in BellSouth's favor.

The Commission cannot and should not address the rates, terms, and conditions that govern BellSouth's Section 271 obligations. The CLECs cannot circumvent the Commission's lack of rate-setting authority by proposing "interim Section 271 rates." Indeed, the CLECs propose as "interim Section 271 rates" the FCC's transitional rates. Those rates unequivocally end at a date certain, thus, what the CLECs want would extend the transitional rates beyond their ending date until some unknown rate setting proceeding occurs and permanent state commission 271 rates are ordered. In an attempt to bolster their "interim" rate proposal, the CLECs will likely relying on testimony BellSouth filed in South Carolina (this testimony was never even entered into the evidentiary record) in an effort to show that "interim 271 rates" that

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[122] PAT-1, Section 1.1.

are close to TELRIC rates recover BellSouth's costs. However, the FCC has addressed various CLEC "just and reasonable" rate claims in its appellate papers filed in the D.C. Circuit Court of Appeals and explained:

> The CLECs dispute the [FCC's] finding that unbundled mass market switching creates investment disincentives. They contend that TELRIC rates are much higher than the [FCC's] analysis suggests. The CLECs' characterization of TELRIC rates is just not credible. If (as the CLECs assert) TELRIC switching rates are at or above "the upper end" of a "just and reasonable range", then presumably CLECs would have stopped paying high UNE rates and started serving their mass market customers with the switches they had already purchased and deployed to serve enterprise customers.
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> * * * *
>
> The CLECs question the reasonableness of *any* rate increase. They assert that rates for unbundled switching were already at or above the "high end" of "the just and reasonable range" before the FCC prescribed the interim rate increase ... The CLECs' own conduct is inconsistent with their claim that TELRIC-based switching rates are high or excessive. The CLECs continued to pay TELRIC rates even though they could have served their mass market customers with non-ILEC switches that they had already purchased and deployed to serve enterprise customers. Competitors' persistent reliance on UNE-P - even after extensive deployment of competitive switches – provides powerful evidence that TELRIC-based switching rates were not even close to "the high end" of the permissible range of rates under the "just and reasonable" standard of section 201(b).[123]

As the FCC makes clear, using rates that are at, or close to TELRIC, are not to perpetuate the investment disincentives that existed under the UNE-P regime. CompSouth's attempt to obtain such rates shows that it wishes to evade the regulatory changes mandated by the *TRRO*.

Just as the CLECs tried to avoid the definitive start date of the *TRRO,* this is simply an attempt to circumvent the ending date, in an effort – in the words of the Eleventh Circuit – "to cram as many new customers as possible before they are forced to bow to the inevitable."[124] This clinging to the former regulatory regime also undermines the results of BellSouth's

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[123] See Hearing Exh. 12, *Brief of the FCC,* Respondents, United States District Court of Appeals, District of Columbia Circuit, Case No. 05-1095, pp. 32, 36 (citations omitted), *oral argument scheduled* Feb. 26, 2006.

[124] *Eleventh Circuit Order* at * 13.

commercial negotiations – negotiations that have resulted in over one hundred and fifty agreements.[125] The Commission cannot and should not allow such an outcome.

The Commission has recognized that the FCC meant what it said about the No New Adds date, and it must likewise recognize that the FCC's end date for imposing transitional rates is equally important. It is clear that the FCC intended that those rates convert to market rates at that point. Had the FCC intended the transitional rates to last until replaced by state-set rates, it would have said so. It did not say so, because that is not what the law requires. Having recognized that the de-listed UNEs should not be required to be provided at the rates previously in place, due to their adverse impact on competition, the FCC set a firm end date to its transition plan, which states must not ignore.

D. <u>Issue 14: Commingling:</u> *What is the scope of commingling allowed under the FCC's rules and orders and what language should be included in Interconnection Agreements to implement commingling (including rates)*?

<u>Relevant Contract Provisions:</u> PAT-1 Section 1.11, PAT-2 Section 1.11

BellSouth allows ***real*** commingling, but not surprisingly, that is not what the CLECs are seeking. Instead, the CLECs are attempting to shoe-horn the square peg of UNE-P into the round hole of commingling in yet another attempt to preserve what the FCC clearly intended to end. In contrast, as Ms. Tipton's testimony makes clear, BellSouth's proposed contract language properly implements the FCC's commingling definition.[126] BellSouth's proposed contract language provides, in relevant part, as follows:

1.11 <u>Commingling of Services</u>

1.11.1 Commingling means the connecting, attaching, or otherwise linking of a Network Element, or a Combination, to one or more Telecommunications Services or facilities that <<customer_short_name>> has obtained at wholesale from BellSouth, or the combining of a Network Element or

[125] Tr. at 113 (Blake Rebuttal at 4).
[126] Tr. at 322-326 *and* 376-337.

Combination with one or more such wholesale Telecommunications Services or facilities. <<customer_short_name>> must comply with all rates, terms or conditions applicable to such wholesale Telecommunications Services or facilities.

* * * *

1.11.5 Notwithstanding any other provision of this Agreement, BellSouth shall not be obligated to commingle or combine Network Elements or Combinations with any service, network element or other offering that it is obligated to make available only pursuant to Section 271 of the Act.[127]

CompSouth's contract language cannot and should not be adopted by the Commission. CompSouth's language would improperly assert state commission authority over Section 271 obligations and would resurrect UNE-P, which is completely inappropriate, as discussed above in response to Issue 8.[128] To the extent that CompSouth's language includes commingling of Section 251 loops or transport UNEs with Section 271 loops or transport checklist items, the CLECs' proposed terminology is simply a red herring, designed to deflect attention from the CLECs' attempt to resurrect UNE-P under the guise of commingling.[129]

The overreaching problem with CompSouth's proposed contract language is that it improperly asserts state commission regulation over Section 271 obligations. As discussed extensively in connection with Issue 8, above, Congress granted the FCC exclusive jurisdiction to regulate the terms by which BellSouth complies with its Section 271 obligations. Because the FCC alone has that authority, this Commission must reject out of hand any suggestion that Section 271 services must be commingled with other UNEs.

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[127] *See* Exhibits PAT-1, Section 1.11, PAT-2, Section 1.11.

[128] *See* First Revised Exhibit JPG-1, p. 32, Section 1.11.1 (CompSouth's proposed language, providing that "[t]he wholesale services that can be commingled with Network Elements or a Combination include network elements required to be unbundled under Section 271".)

[129] Because BellSouth satisfies its Section 271 loop and transport obligations through its tariffed access services, BellSouth combines a Section 251 loop with tariffed transport, which transport serves as BellSouth's Section 271 offering. That is why the CLECs' listing of loop and transport commingling arrangements they propose to include in contracts is a red herring. The CLECs know that BellSouth already connects 251 UNEs with tariffed access services. Indeed, CLECs have no need for any "retroactive" commingling language for that reason.

Even if the FCC's jurisdiction over Section 271 were not exclusive (which it is), a careful review of commingling indicates BellSouth has no obligation to commingle 251 services with 271 services. Although the FCC enacted its federal commingling rule in connection with the *TRO,* the term "commingling" was first used in the FCC's *Supplemental Order on Clarification*, FCC 00-183, CC Docket No. 96-98 (rel. June 2, 2000) ("*SOC*"). There, the FCC discussed commingling as combining loops or loop-transport combinations with ***tariffed special access services***.

> We further reject the suggestion that we eliminate the prohibition on "commingling" (*i.e.* combining loops or loop-transport combinations with tariffed special access services) in the local usage options discussed above."[130]

By using the phrase "i.e.", which commonly means, "that is," the FCC in the *SOC* understood commingling as referring to a service combination that expressly included tariffed access services.

The FCC's discussion of commingling in the *TRO* was ultimately consistent with its discussion in the *SOC* as explained more fully below. In the *TRO*, the FCC explained that commingling meant

> the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the ***combining*** of a UNE or UNE combination with one or more such wholesale services.[131]

Thus, despite the CLECs' attempts to create a distinction between an ILEC's commingling obligation and the combination obligation,[132] the FCC used the terms interchangeably.[133]

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[130] *SOC* at ¶ 28

[131] *TRO,* ¶ 579 (emphasis added).

[132] *See* Tr. at 458-460.

[133] Mr. Gillan's testimony on this point is illogical. He describes the FCC's use of the terms combining and commingling as a matter of "semantic construction," claims BellSouth is "not technically required to 'combine' § 271 elements," then claims BellSouth has an obligation to "connect § 271 elements." Tr. at 458-459 (Gillan Direct at 49-50). Mr. Gillan's word choice – connect, instead of combine – is of no consequence. The definition of

The FCC was very clear that BellSouth and other RBOCs have no obligation to combine 271 elements or to combine elements that are no longer required to be unbundled pursuant to Section 251(c)(3) of the Act. ("We decline to require BOCs, pursuant to Section 271, to combine network elements that no longer are required to be unbundled under Section 251.").[134] This aspect of the FCC's ruling was upheld on appeal, and the appellate court explained that the FCC had "decided that, in contrast to ILEC obligations under § 251, the independent § 271 unbundling obligations didn't include a duty to combine network elements."[135]

The strained argument of the CLECs on this point is telling. In an effort to cloud this issue, CLECs make a "double-strike" argument that cannot pass muster. The argument centers on two deletions from the *TRO,* which deletions were made in the *TRO Errata.* Prior to its *Errata,* the FCC originally stated,

> [a]s a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements ***unbundled pursuant to section 271*** and any services offered for resale pursuant to section 251(c)(4) of the Act.[136]

Notably, when the *Errata* was issued however, the phrase "unbundled pursuant to section 271" ***was deleted***.[137] Thus, the language of the *TRO,* as corrected by the *Errata*, requires

> incumbent LECs [to] permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements and any services offered for resale pursuant to section 251(c)(4) of the Act.

Hence, the first "strike."

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commingling at 47 C.F.R. §51.5 includes "the combining of an unbundled network element … with one or more such facilities or services." Since Mr. Gillan testifies that BellSouth is not required to "combine" § 271 elements, and the definition of commingling includes the obligation of combining a UNE with other facilities or services, Mr. Gillan effectively concedes BellSouth has no obligation to commingle § 271 network elements with UNEs.

[134] *See TRO* at ¶ 655, n. 1989. The *TRO,* as originally issued, had this language at note 1990. After the *TRO Errata* the footnotes were renumbered, and the remaining language appears at note 1989.

[135] *USTA II,* 359 F.3d at 589. Significantly, the Section 271 checklist obligates BellSouth to provide local loop transmission "*unbundled from local switching and other services",* local transport *"unbundled from switching or other services",* and switching "*unbundled from transport, local loop transmission or other services."*

[136] *TRO* at ¶ 584 (emphasis supplied).

[137] *TRO Errata*, at ¶ 27.

The second "strike" also occurred in the *TRO Errata*. At the same time the FCC deleted the phrase "unbundled pursuant to Section 271" from its discussion of commingling in paragraph 584 of the *TRO,* it also deleted the sentence, "We also decline to apply our commingling rule, as set forth in Part VII.A., above, to services that must be offered pursuant to these checklist items" from its discussion in the section 271 portion of the *TRO.*[138] The CLECs make the absurd argument that, read together, the two deletions were intended to correct any potential conflict. That argument cannot stand – had the FCC desired to impose some type of commingling or combining obligation on BellSouth, it would have only needed to delete the language at footnote 1990, yet retain its original language in paragraph 584, which, as originally issued, appeared to impose an obligation to commingle UNEs with Section 271 network elements. That was not what the FCC did – it made two deletions, one of which clearly removed any commingling of Section 251 UNEs with Section 271 network elements.

Ultimately, by making its deletions, the federal commingling rule issued by the *TRO* became entirely consistent with the discussion of commingling in the *SOC*. That is because the words wholesale services are repeatedly referred to as tariffed access services. Thus, when the CLECs attempt to ignore the FCC's deletion and focus on the words "wholesale services" their reliance cannot stand. Although the CLECs contend wholesale services must include Section 271 obligations, the FCC clearly intended to limit the types of wholesale services that are subject to commingling. This is because, in describing wholesale services in the *TRO*, the FCC referred only to ***tariffed access services***, just as it had in the *SOC,* explaining, in relevant part, as follows. First,

> We therefore modify our rules to affirmatively permit requesting carriers to commingle UNEs and combinations of UNEs with services (*e.g.*, switched and special access services offered pursuant to tariff).

[138] *See TRO,* n. 1989 (prior to the *TRO Errata,* this was footnote 1990).

Next,

> Competitive LECs may connect, combine, or otherwise attach UNEs and combinations of UNEs to wholesale services (*e.g.*, switched and special access services offered pursuant to tariff).

Third,

> We do not require incumbent LECs to implement any changes to their billing or other systems necessary to bill a single circuit at multiple rates (*e.g.*, a ... circuit at rates based on special access services and UNEs).

Then,

> We require incumbent LECs to effectuate commingling by modifying their interstate access service tariffs to expressly permit connections with UNEs and UNE combinations.

Finally,

> Commingling allows a competitive LEC to connect or attach a UNE or UNE combination with an interstate access service, such as high-capacity multiplexing or transport services.[139]

The foregoing passages, along with the deletion of Section 271 in the description of commingling in the *Errata,* show clearly that the FCC never intended for ILECs to commingle Section 271 elements with Section 251 UNEs. Moreover, language within the *TRRO,* read in conjunction with the *TRO,* is consistent. In addressing conversion rights in the *TRO,* the FCC referred to "wholesale services," concluding, "Carriers may both convert UNEs and UNE combinations to ***wholesale services*** and convert wholesale services to UNEs and UNE combinations ...."[140] Then, when describing this conversion holding in the *TRRO*, the FCC explicitly limited its discussion to the conversion of ***tariffed services*** to UNEs: "We determined in the *TRO* that competitive LECS may convert ***tariffed incumbent LEC services*** to UNEs and

[139] *TRO at* ¶¶ 579 – 581, 583.
[140] *TRO* at ¶ 585 (emphasis supplied).

UNE combinations ....”[141] It is clear, therefore, that the FCC narrowly interprets “wholesale services” as limited to tariffed services, and it does not expect or require BellSouth to combine or commingle Section 271 network elements with Section 251 network elements.

Any other interpretation of BellSouth’s commingling obligation would undermine the FCC’s findings in the *TRRO* that decline to require unbundling of UNE-P due to the investment disincentives previous unbundling rulings had created.[142] Significantly, if BellSouth is required to combine or commingle Section 251 elements – such as loops – with services BellSouth provides only pursuant to Section 271 – such as switching – the result will be to effectively recreate UNE-P under the guise of commingling. The FCC made clear in the *TRRO*, however, that there is “no section 251 unbundling requirement for mass market local circuit switching nationwide.”[143] And, both the New York Public Service Commission as well as the Mississippi Federal District Court have indicated that the “FCC’s decision ‘to not require BOCs to combine Section 271 elements no longer required to be unbundled under Section 251, [made] it [] clear that there is no federal right to 271-based UNE-P arrangements.’”[144] UNE-P is abolished and the CLECs cannot properly ask state commissions to recreate it disguised as a Section 271 commingling obligation.

The North Carolina Commission recently addressed this issue in a proceeding between BellSouth and NuVox in Docket No. P-772, Sub 8, finding:

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[141] *TRRO* at ¶ 229 (emphasis supplied).

[142] *TRRO* at ¶ 218.

[143] *TRRO* at ¶ 199.

[144] *BellSouth v. Mississippi Public Serv. Comm’n*, Civil Action No. 3:05CV173LN at 16-17 (stating that the court would agree with the New York Commission’s findings) (quoting *Order Implementing TRRO Changes*, Case No. 05-C-0203, N.Y. P.S.C. (Mar. 16, 2005)).

> The Commission believes that … the FCC did not intend for ILECs to commingle Section 271 elements with Section 251 elements. After careful consideration, the Commission finds that there is no requirement to commingle UNEs or combinations with services, network elements or other offerings made available only under Section 271 of the Act.[145]

That was the correct ruling, and it should apply here.

Moreover, The Florida Commission reached the same conclusion in an analogous arbitration:

> In paragraph 584 of the *TRO*, the FCC said "as a final matter we require the incumbent LECs to permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements unbundled pursuant to Section 271 and any services offered for resale pursuant to section 251(c)(4) of the Act." The FCC's errata to the TRO struck the portion of paragraph 584 referring to '... any network elements unbundled pursuant to Section 271 ....' The removal of this language illustrates that the FCC did not intend commingling to apply to Section 271 elements that are no longer also required to be unbundled under section 251(c)(3) of the Act. ***Therefore, we find that BellSouth's commingling obligation does not extend to elements obtained pursuant to section 271.***[146]

The Florida Commission reasoned that the elimination of UNE-P justified adopting BellSouth's position on commingling:

> Further, we find that connecting a section 271 switching element to a section 251 unbundled loop element would, in essence, resurrect a hybrid of UNE-P. This potential recreation of UNE-P is contrary to the FCC's goal of furthering competition through the development of facilities-based competition.[147]

In reaching this conclusion, the Florida Commission explained:

> COMMISSIONER EDGAR * * * *
>
> So ... I think we need to do is look at in the larger context, and that the language at issue should be interpreted within the larger context of FCC decisions and direction, and in keeping with this Commission's recognition of that direction.

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[145] *See* NCUC Docket No. P-772, Sub 8, *Recommended Arbitration Order* at 24.
[146] FPSC Order No. PSC-05-0975-FOF-TP at 19 (October 11, 2005). (emphasis added.)
[147] FPSC Order No. PSC-05-0975-FOF-TP at 19.

> Recreating UNE-Ps or UNE-P type service provisions, I believe, is in contradiction to the goals of the FCC and the direction that they have laid out in the TRO and as followed through with the errata that came after than. I also don't believe that the CLECs are significantly disadvantaged by removing 271 services from those services that must be commingled with UNEs or with UNE combinations. 271 services will continue to be available from BellSouth through special access tariffs or commercial agreements. [148]

The Kansas Commission also addressed commingling, ruling: (1) Southwestern Bell Texas ("SWBT") was "not under the obligation to include 271 commingling provisions in successor agreements"; (2) "271 commingling terms and conditions had ***no home*** in [interconnection] agreements"; and (3) if it ordered SWBT to provide commingling and SWBT refused the commission "would have no enforcement authority against SWBT because that authority ... resides with the FCC."[149] The Commission should reach the same conclusion here.

E. <u>Issue 17: Line Sharing:</u> *Is BellSouth obligated pursuant to the Telecommunications Act of 1996 and FCC Orders to provide line sharing to new CLEC customers after October 1, 2004?*

<u>Relevant Contract Provisions:</u> EF-1 Section 3.1.2

The FCC has made it quite clear that BellSouth has no obligation to provide new line sharing arrangements after October 1, 2004.[150] BellSouth asks the Commission to implement this aspect of the *TRO* and require CLECs to eliminate line sharing from their interconnection agreements in South Carolina (to the extent a CLEC has a regionwide agreement and has line sharing arrangements in place it would need to include language that implements the *TRO's*

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[148] Florida Commission transcript of Aug. 30, 2005 Agenda Conference, Docket No. 040130-TP, released Sept. 16, 2005.

[149] *See Kansas Order* at ¶¶ 13-14 (emphasis added). BellSouth acknowledges the Kentucky Public Service Commission in its region, and other state commissions outside its region have required commingling of Section 251 UNEs and Section 271 obligations. The Kentucky Commission recently decided to rehear this issue. Also, some states, although they have properly recognized their lack of Section 271 authority have nonetheless erroneously determined that ILECs must allow requesting carriers to commingle Section 251(c)(3) UNEs with Section 271 elements. *E.g., Washington Covad/Qwest Decision, Massachusetts Arbitration Order.*

[150] Tr. at 183 (*citing TRO* at ¶¶ 199, 260-262, 264-265).

binding transition mechanism for access to the high frequency portion of the loop ("HFPL")).[151] BellSouth's request is both reasonable and appropriate, particularly given there are no line sharing arrangements in place in South Carolina.[152]

In an effort to avoid implementing the *TRO* and the federal rules concerning line sharing, however, the CLECs (primarily Covad) claim that line sharing is a Section 271 obligation. This argument fails for several reasons. For one thing, the plain language of Section 271 does not require line-sharing. Checklist item 4 requires BOCs to offer "local loop transmission, unbundled from local switching and other services."[153] Clearly, when line sharing occurs, transmission, local switching, and other services are being provided over a single line.[154] Consequently, providing line sharing would conflict with the statutory language. Moreover, the FCC has authoritatively defined the "local loop" as a specific "transmission facility" between a LEC central office and the demarcation point on a customer premises.[155] BellSouth thus meets its checklist item 4 obligations by offering access to unbundled loops and the "transmission" capability on those facilities.[156] The CLECs argue that because the HFPL is "a complete transmission path," it somehow constitutes "a ***form of*** **'loop** transmission facility'" under checklist item 4. This argument makes no sense. To make it, the CLECs must ignore the portion of the definition of HFPL that defines HFPL as a "complete transmission path ***on the frequency***

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[151] Tr. at 183.
[152] *Id.*
[153] 47 U.S.C. § 271(d)(2)(B)(iv).
[154] *See*, e.g., *TRO* at ¶255 (explaining that the end user in a line sharing arrangement is receiving both voice and DSL service over the same facility).
[155] 47 C.F.R. § 51.319(a).
[156] The Joint CLECs cite to FCC 271 orders for the proposition that line sharing is a Section 271 obligation, yet offer no explanation for the fact that neither New York nor Texas were required to offer line sharing to obtain Section 271 approval. If line sharing actually had been required in order to receive long distance authority under checklist item 4, then the FCC could not have granted Verizon and SBC Section 271 authority. *See In the Matter of Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York,* CC Docket No. 99-295, 15 FCC Rcd 3953 (Dec. 22, 1999); *In the Matter of Application by SBC Communications, Inc., et al.; Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas,* CC Docket No. 00-65, 15 FCC Rec'd 18354 (June 30, 2000).

range above the one used to carry analog circuit switched voice transmissions …."[157] In other words, the HFPL is only part of the facility – not the entire "transmission path" required by checklist item 4.

A simple but appropriate analogy makes the point – it is as if one ordered a birthday cake from a bakery but received only the icing. Certainly the buyer would not consider the icing alone a "form" of birthday cake. On the contrary, the requirement was a whole cake, not just a portion of it, just as checklist item 4 requires the entire transmission facility, not just the high frequency portion of the transmission facility.

Notwithstanding federal law, Covad and other CLECs flatly refuse to include the FCC's transition plan in Section 252 interconnection agreements, thus necessitating a resolution of this issue. Notably, neither Covad nor any other CLEC witness filed testimony that explained their view. Instead, CompSouth's witness filed contract language addressing the issue, but readily acknowledged he did not sponsor any testimony (aside from his support of Covad's Section 271 line sharing theory) to support his proposed contract language.[158]

Beyond the obvious fact that line sharing cannot credibly consist of a form of loop transmission, the CLEC argument is that, notwithstanding the clear language of the FCC in its *TRO*, CLECs can obtain the HFPL indefinitely and at rates other than the ones the FCC specifically established in its transition plan simply by requesting access to those facilities under section 271 instead of section 251.[159] This position is deeply illogical and inconsistent with both the statutory scheme and the FCC's binding decisions.

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[157] *TRO,* ¶ 268.
[158] Gillan Deposition at 77.
[159] While many CLECs have interconnection agreements that contain line sharing language that needs to be amended, only nine CLECs have active line sharing arrangements in place in BellSouth's region and none of these arrangements are in South Carolina. Tr. at 183-184.

First, if for no other reason, the CLECs' argument must fail for the same reason that it fails in response to Issue 8(a). Even if line sharing could be construed to be a Section 271 network element, an ILEC cannot be required to include Section 271 elements in a Section 252 interconnection agreement.

Second, if that is not sufficient, the CLECs' theory that line sharing is still available as a Section 271 element is illogical because it would render irrelevant the FCC's carefully-calibrated transition plan to wean CLECs away from the use of line-sharing and to transition them to other means of accessing the ILEC's facilities, such as access to whole loops and line-splitting, that do not have the same anti-competitive effects that the FCC concluded are created by line-sharing. As the FCC explained, "access to the whole loop and to line splitting but not requiring the HFPL to be separately unbundled ***creates better competitive incentives***."[160] Because of the inherent difficulties in pricing access to just the HFPL (difficulties that exist regardless whether access is required under Section 251 or, as Covad claims, under Section 271), allowing competitive LECs to purchase a whole loop or to engage in line-splitting "but ***not*** requiring the HFPL to be separately unbundled" puts CLECs "in a more fair competitive position."[161]

Indeed, the FCC expressly found continued unlimited access to line-sharing to be ***anticompetitive*** and contrary to the core goals of the 1996 Act. Allowing continued line sharing

> would likely discourage innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECS' and the competitive LECs' offerings. We find that ***such results would run counter to the statute's express goal of encouraging competition and innovation in all telecommunications markets***.[162]

The CLECs cannot reasonably contend that after eliminating these anti-competitive consequences under Section 251, the FCC has allowed these ***same*** untoward effects to go on

[160] *TRO* at ¶ 260. (emphasis added).
[161] *Id.*
[162] *Id.* ¶ 261 (emphasis added).

unchecked under Section 271. On the contrary, subsequent FCC orders confirm that the federal agency continues to believe that it has required CLECs to obtain, in lieu of line sharing, a whole loop or engage in line-splitting. Thus, in its very recent *BellSouth Declaratory Ruling Order,*[163] the FCC again stressed that, under its rules, "a competitive LEC officially leases the entire loop."[164] Moreover, far from suggesting an open-ended Section 271 obligation to allow line-sharing, this very recent FCC decision reiterates that line sharing was required "***only*** under an express three-year phase out plan."[165] The FCC's statement cannot be squared with the notion that line-sharing is also required indefinitely under Section 271.

Moreover, there is not a single mention of line sharing in Section 271. It bears repeating that, by its plain text, Section 271 does not require line-sharing when such access is no longer mandated as a separate UNE (and thus required under Section 271 checklist item 2). Instead, checklist item 4 requires BOCs to offer "local loop transmission, unbundled from local switching and other services."[166] The FCC has authoritatively defined the "local loop" as a specific "transmission facility" between a LEC central office and the demarcation point on a customer premises.[167] BellSouth thus meets its checklist item 4 obligation by offering access to complete loops and thus all the "transmission" capability on those facilities. Nothing in checklist item 4 requires more.

But even if (hypothetically) Section 271 did require line-sharing, the FCC's recent forbearance decision would have removed any such obligation.[168] BellSouth understands that Covad disputes the fact that line sharing is included in the relief granted in the *Broadband 271*

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[163] *See Memorandum Opinion and Order and Notice of Inquiry*, WC Docket No. 03-251 (Mar. 25, 2005) ("BellSouth Declaratory Order").

[164] (¶ 35).

[165] *Id.* ¶ 5 n. 10 (emphasis added).

[166] 47 U.S.C. § 271(d)(2)(B)(iv).

[167] 47 C.F.R. § 51.319(a).

[168] *Memorandum Opinion and Order*, WC Docket Nos. 01-338, 03-235, 03-260, and 04-48 released October 27, 2004 ("*Broadband 271 Forbearance Order*").

Forbearance Order. A review of the record in that case, however, demonstrates that the relief granted extended to all broadband elements, including the HFPL. As stated by Chairman (then Commissioner) Martin:

> While the Commission did not specifically address line sharing in today's decision, the Bell Operating Companies had included a request in their petitions that we forbear from enforcing the requirements of section 271 with respect to line sharing [citing *Verizon Petition for Forbearance*]. Since line-sharing was included in their request for broadband relief and we affirmatively grant their request, I believe today's order also forbears from any Section 271 obligation with respect to line-sharing. Regardless of whether it was affirmatively granted, because the Commission's decision fails to deny the requested forbearance relief with respect to line sharing, it is therefore deemed granted by default under the statute. [169]

As stated by Chairman Martin, the Bell Operating Companies, including, BellSouth included line sharing in their *Petitions for Forbearance* filed with the FCC, and the relief granted therefore also included line sharing. BellSouth's Petition in particular "[sought] forbearance from the same broadband elements as sought by Verizon,"[170] and was patterned after an earlier petition filed by Verizon. Verizon's petition, in turn, asked the FCC to forbear from imposing any 271 obligation on the broadband elements that the FCC had eliminated in the *TRO*. BellSouth's FCC Petition likewise requested, in relevant part, that:

> [T]o the extent the Commission determines § 271(c)(2)(B) to impose the same unbundling obligations on BOCs as established by § 251(c) that the Commission forbear from applying any stand-alone unbundling obligations on broadband elements. ***While BellSouth believes that no such obligations exist, it files this***

[169] Statement of Commissioner Kevin J. Martin, *Broadband 271 Forbearance Order. Id.;* BellSouth acknowledges that the separate statement of former FCC Chairman Powell – which statement was amended *after* the FCC issued a press release concerning the adoption of the *Broadband 271 Forbearance Order* – conflicts with Chairman Martin's statement. Mr. Powell's amended statement, however, does not address Section 160(c) of the Act, which obligates the FCC to rule on forbearance petitions within fifteen months of the filing date of the petition. Moreover, the FCC did not deny any part of the BellSouth petition that asked for forbearance for all broadband elements de-listed under Section 251. Consequently, the lack of any additional language that explicitly addresses line sharing means that the FCC must forbear from enforcing any 271 obligations that may exist with respect to line sharing, as recognized by Chairman Martin. Also, while Mr. Powell indicated that line sharing is excluded from the Broadband 271 Forbearance Order, he did not explain the basis for his conclusion nor did he address the legal argument that the FCC's failure to deny the petitions results in granting forbearance for line sharing as well as the other cited elements. In contrast, Chairman Martin's statement was supported by applicable law.

[170] *Broadband 271 Forbearance Order*, at ¶ 9.

> ***Petition in an abundance of caution to ensure that the Commission does not impose such obligations where there is ample evidence to demonstrate that the unbundling obligations required by § 251 are unnecessary to meet the purpose of § 271.*** Through this Petition, BellSouth is seeking the same relief requested by Verizon in its Petition for Forbearance filed October 1, 2003.

(emphasis added).

In its forbearance order, the FCC stated that,

> [a]lthough Verizon's Petition was ambiguous with regard to the exact scope of the relief requested, later submissions by Verizon clarify that Verizon is requesting forbearance relief only with respect to those broadband elements for which the Commission made a national finding relieving incumbent LECs from unbundling under section 251(c). [171]

In this regard, the FCC cited to a March 26, 2004 *ex parte* letter filed by Verizon. In relevant part, Verizon's March 26, 2004 letter included a white paper that specifically referred to line sharing. Indeed, referring to *USTA II,* Verizon stated:

> [t]he court reached similar conclusions with respect to ***other broadband elements. ... with respect to line sharing,*** the court again concluded that, even if CLECs were impaired to some degree without mandatory line sharing, the Commission had properly concluded given the 'substantial intermodal competition from cable companies' that, 'at least in the future, line sharing is not essential to maintain robust competition in this market.' [172]

BellSouth's request for relief, which relies on the Verizon filing, thus includes line sharing.

Indeed, the only logical conclusion is that the RBOCs included in their petitions for forbearance all of the broadband elements the FCC eliminated in the *TRO.* The FCC eliminated unbundling of most of the broadband capabilities of loops in the *TRO*, and its rationale was consistent for each of these capabilities. It eliminated unbundling of fiber-to the-home loops, the packetized portion of hybrid loops, and packet switching (all broadband elements), based on "the impairment standard and the requirement of section 706 of the 1996 Act to provide incentives for

[171] *Broadband 271 Forbearance Order, at ¶ 2, n. 9.*

[172] Verizon's March 26, 2004 filing, WC Docket Nos. 01-338, 03-235, 03-260, and 04-48.

all carriers, including the ILECs, to invest in broadband facilities."[173] It used the same rationale to eliminate the HFPL broadband element.[174] As stated by the D.C. Circuit Court of Appeals in affirming these portions of the *TRO:*

> [t]he Commission declined to require ILECs to provide unbundled access to most of the broadband capabilities of mass market loops. In particular, it decided … not to require unbundling of the broadband capabilities of hybrid copper-fiber loops, Order ¶¶ 288-89, or fiber-to-the-home ("FTTH") loops, id. ¶ 273-77, and it also decided not to require ILECs to unbundled the high frequency portion of copper loops, a practice known as "line sharing," id. ¶¶ 255-63.[175]

As noted in the *Broadband 271 Forbearance Order*, the D.C. Circuit expressly upheld the FCC's finding that it was appropriate to relieve the BOCs from the unbundling on a national basis "for the broadband elements at issue."[176] And the D.C. Circuit Court's opinion clearly contemplates that "the broadband elements at issue" included line sharing.[177] There is simply no rational basis for excluding one broadband element – line sharing – from the broadband relief the FCC granted.

There is, however, every reason to conclude that the FCC did, in fact, forbear from imposing any Section 271 obligations on each of these broadband elements. The benefits to broadband competition of forbearing from imposing 271 obligations on the fiber loop elements apply equally to forbearance of line sharing arrangements. For example, the FCC held that:

> The [FCC] intended that its determinations in the *Triennial Review* proceeding would relieve incumbent LECs of such substantial costs and obligations, and encourage them to invest in next-generation technologies and provide broadband services to consumers. We see no reason why our analysis should be different when the unbundling obligation is imposed on the BOCs under section 271 rather than section 251(c) of the Act.[178]

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[173] *Broadband 271 Forbearance Order* at ¶ 7, *citing TRO* at ¶¶ 242 – 44.

[174] *TRO* at ¶¶ 258 – 63.

[175] 359 F.3d 554, at 226.

[176] *Broadband 271 Forbearance Order*, n. 73, *citing USTA II*, 359 F.3d at 578 – 85.

[177] The D.C. Circuit's discussion of the CLEC challenges to "Unbundling of Broadband Loops" includes hybrid loops, fiber-to-the-home loops, and line sharing. *USTA II* at 578 – 85.

[178] *Broadband 271 Forbearance Order* at ¶ 34.

This holding mirrors the FCC's conclusion about the effect of removing line sharing from the UNE list in the *TRO*.[179] The FCC also explained "[t]here appear to be a number of promising access technologies on the horizon and we expect intermodal platforms to become increasingly a substitute for … wireline broadband service."[180] Finally, the FCC concluded:

> Broadband technologies are developing and we expect intermodal competition to become increasingly robust, including providers using platforms such as satellite, power lines and fixed and mobile wireless in addition to the cable providers and BOCs. We expect forbearance from section 271 unbundling will encourage the BOCs to become full competitors in this emerging industry and at the same time substantially enhance the competitive forces that will prevent the BOCs from engaging in unjust and unreasonable practices at any level of the broadband market.[181]

Just as forbearance from 271 obligations for fiber to the home and fiber to the curb loops is good for broadband competition, so is forbearance from any line sharing obligations.

Even if the FCC's forbearance order did not expressly address line sharing, under Section 160(a), any petition for forbearance not denied within the statutory time period is deemed granted.[182] Thus, as explained by Chairman (then Commissioner) Martin in his concurring statement,

> regardless of whether it was affirmatively granted, because the [FCC's] decision fails to deny the requested forbearance relief with respect to line sharing, it is therefore deemed granted by default under the statute.

Neither Covad nor any other CLEC can identify any place where the FCC denied the forbearance petition as to line-sharing. Thus, as a matter of law, the petition was granted as to that functionality.[183]

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[179] *TRO* at ¶ 263 ("we anticipate that the [FCC's] decisions in this Order and other proceedings will encourage the deployment of new technologies providing the mass market with even more broadband options").

[180] *Broadband 271 Forbearance Order* at ¶ 22.

[181] *Broadband 271 Forbearance Order* at ¶ 29.

[182] 47 U.S.C. § 160(c) ("[a]ny such petition shall be deemed granted if the Commission does not deny the petition ….").

[183] CompSouth seeks to persuade the Commission that Chairman Martin's view is "manifestly incorrect." *See CompSouth's SJ Response*, p. 42-43.

Finally, commission decisions in Tennessee, Massachusetts, Michigan, Rhode Island and Illinois support BellSouth's position. In addressing a dispute between BellSouth and Covad, the Tennessee Commission determined that the FCC's transition plan constitutes the only obligation BellSouth has regarding line sharing.[184] Likewise, in Rhode Island, Verizon had previously filed tariffs setting forth certain wholesale obligations. Following the *TRO,* Verizon filed tariff revisions, including a revision that eliminated line sharing from the classification as a UNE. Covad objected to Verizon's revision, claiming, as it did in this docket, that Verizon had a Section 271 line sharing obligation. The Rhode Island Commission rejected Covad's arguments and approved Verizon's tariff modifications.[185]

Also, the Illinois Commission has rejected CLEC arguments that line sharing is a Section 271 obligation. In relevant part, in an arbitration decision addressing SBC's obligations under the *TRO,* the Illinois Commission held,

> as for XO's contention that the ICA should reflect line-sharing obligations under Section 271 and state law, the Commission notes that the HFPL is not a [Section] 271 checklist item ... [p]atently, no reference to Section 271 obligations belongs in the ICA.[186]

The Massachusetts Commission directed the parties "to include the [FCC's] line sharing rules verbatim in" interconnection agreement amendments.[187] In Michigan, that commission dismissed a CLEC's complaint seeking to force SBC to include new line sharing; the CLEC

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[184] Docket No. 04-00186, Order dated July 20, 2005. Covad has requested rehearing of this order. BellSouth acknowledges that other state commissions have reached different conclusions; however, to the extent that continued line sharing was required based upon state tariffs that preexisted the *TRO* any such decisions are distinguishable.

[185] *Report and Order*, 2004 R.I. PUC LEXIS 31, *In re: Verizon-Rhode Island's Filing of October 2, 2003 to Amend Tariff No. 18*, Rhode Island Public Utilities Commission, Docket No. 35556 (October 12, 2004).

[186] *In re: XO Illinois*, 2004 WL 3050537 (Ill. C.C. Oct. 28, 2004).

[187] *Massachusetts Arbitration Order,* p. 185.

claimed SBC had a Section 271 obligation.[188] The Commission should endorse the FCC's transition plan and make clear that no new line sharing arrangements can be ordered under the federal rules. [189]

F. <u>Issue 18: Line Sharing – Transition:</u> *If the answer to Issue 17 is negative, what is the appropriate language for transitioning off a CLEC's existing line sharing arrangements?*

<u>Relevant Contract Provisions:</u> EF-1; EF-2

The FCC articulated, as clearly as it could, the transitional plan for line sharing at paragraph 265 of the *TRO*:

> The three-year transition period for new line sharing arrangements will work as follows. During the first year, which begins on the effective date of this Order, competitive LECs may continue to obtain new line sharing customers through the use of the HFPL at 25 percent of the state- approved recurring rates or the agreed-upon recurring rates in existing interconnection agreements for stand-alone copper loops for that particular location. During the second year, the recurring charge for such access for those customers will increase to 50 percent of the state-approved recurring rate or the agreed-upon recurring rate in existing interconnection agreements for a stand-alone copper loop for that particular location. Finally, in the last year of the transition period, the competitive LECs' recurring charge for access to the HFPL for those customers obtained during the first year after release of this Order will increase to 75 percent of the state-approved recurring rate or the agreed-upon recurring rate for a stand-alone loop for that location. After the transition period, any new customer must be served through a line splitting arrangement, through use of the stand-alone copper loop, or through an arrangement that a competitive LEC has negotiated with the incumbent LEC to replace line sharing. We strongly encourage the parties to commence negotiations as soon as possible so that a long-term arrangement is reached and reliance on the shorter-term default mechanism that we describe above is unnecessary.

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[188] *In re: Application of ACD Telecom, Inc. against SBC Michigan for its Unilateral Revocation of Line Sharing Service in Violation of the Parties' Interconnection Agreement and Tariff Obligations and For Emergency Relief,* 2005 Mich. PSC LEXIS 109, Order Dismissing Complaint * 12-13 (Mar. 29, 2005).

[189] In its Georgia post-hearing brief, CompSouth referred to decisions in Maine, Pennsylvania, and Louisiana to support its view. Any reliance on a preliminary Louisiana decision is misplaced – BellSouth has requested the Commission review its January 2005 decision, which it has agreed to do. The Maine decision is on appeal, and the Pennsylvania Commission explicitly relied on Verizon's tariff filing as the basis for its decision, recognizing "there is no basis for this Commission to unilaterally sanction removal of line sharing from Verizon PA's tariff under the present state of FCC orders." Docket No. R-00038871C0001 (July 8, 2004) at 20. Indeed, the Pennsylvania Commission explicitly recognized "the state commission's role in . . . regard to [Section 271] is consultative and the ultimate adjudicative authority lies with the FCC." Id. at 17.

CompSouth's proposed contract language – unsupported by a shred of explanatory testimony or evidentiary support – completely disregards the FCC's plan and binding federal rules.[190]

As shown in connection with Issue 17 above, BellSouth has no obligation to add new line sharing arrangements after October 2004. Accordingly, in order to properly transition existing line sharing arrangements, those South Carolina CLECs with regionwide interconnection agreements and that have line sharing customers must amend their interconnection agreements to incorporate both the line sharing transition plan contained in the federal rules and language that requires CLECs to pay the stand-alone loop rate for arrangements added after October 1, 2004.[191]

G. Issue 22: Call Related Databases: *What is the appropriate ICA language, if any, to address access to call related databases?*

Relevant Contract Provisions: PAT-1 Section 7

BellSouth's proposed contract language concerning call-related databases ties BellSouth's obligation to provide unbundled access to call related databases to BellSouth's limited obligation to provide switching or UNE-P.[192] Pursuant to the *TRO*, ILECs are not obligated to unbundle call-related databases for CLECs who deploy their own switches.[193] The FCC's rules provide that ILECs must provide access to signaling, call-related databases, and shared transport facilities on an unbundled basis only to the extent that local circuit switching is unbundled.[194] This decision applies on a nationwide basis, both to enterprise and mass-market

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[190] *See* Tr. at 214 (Fogle Rebuttal at 7).

[191] Tr. at 186 and 214.

[192] *See* PAT-1 Section 7.1; Tr. at 332-334.

[193] *TRO* at ¶ 551 ("[w]e find that competitive carriers that deploy their own switches are not impaired in any market without access to incumbent LEC call-related databases, with the exception of the 911 and E911 databases as discussed below").

[194] 47 C.F.R. 51.319(d)(4)(i).

switching.[195] Consequently, interconnection agreements should not contain any language regarding the provision of unbundled access to call-related databases other than 911 and E911.

The D.C. Circuit affirmed the FCC's decision on call-related databases. On appeal, the CLECs argued that the only reason that alternatives existed to ILEC databases was because the FCC had previously ordered access to such databases.[196] The Court rejected this argument and held that "[a]s it stands, CLECs evidently have adequate access to call-related databases. If subsequent developments alter this situation, affected parties may petition the [FCC] to amend its rule."[197] To date, no party has filed such a petition.

Because CLECs no longer have access to unbundled switching, CLECs have no unbundled access to call-related databases. BellSouth's legal obligation is expressly limited to providing databases only in connection with switching provided under the FCC's transition plan. To circumvent the binding federal rules, the CLECs once again rely on Section 271, erroneously claiming BellSouth must include language concerning Section 271 access to call-related databases in its interconnection agreements.[198] Because only the FCC has Section 271 authority, and because it is patently unreasonable to assume that the FCC and D.C. Circuit eliminated unbundling requirements for databases only to have such obligations resurrected through Section 271, CompSouth's proposed language must be rejected.

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[195] *TRO* at ¶ 551.
[196] *USTA II* at 50.
[197] *Id.*
[198] Revised Exhibit JPG-1 at 50.

II. Transition Issues (2, 3, 4, 5, 9, 10, 11, 32)

A. Issue 2: *TRRO* Transition Plan *What is the appropriate language to implement the FCC's transition plan for (1) switching, (2) high capacity loops and (3) dedicated transport as detailed in the FCC's TRRO, issued February 4, 2005?*

Relevant Contract Provisions: (1) Switching: PAT-1, Sections 4.2, 4.4.2 and 5.4; (2) High Capacity Loops: PAT-1 Sections 2.1.4 and 2.8.4; (3) Dedicated transport: PAT-1, Sections 6.2 and 6.9.1

1. Summary of Argument

The overriding disputes between BellSouth and the CLECs concerning the FCC's transition plan include establishing contract language for an orderly transition that is completed by the end date of the transition period established by the FCC and making clear that CLECs cannot pay UNE rates after they have migrated from Section 251 UNEs to other serving arrangements.[199] In addition, the CLECs improperly seek contract language that would allow them to transition from Section 251 UNEs to Section 271 checklist items. Any such language must be rejected as explained in connection with Issue 8.

It is clear from the FCC's own language that CLECs should not be allowed to wait until the eleventh hour to work cooperatively with BellSouth to establish an orderly transition. Instead, the FCC stated that its timeframes provide: (1) adequate time to perform "the ***tasks*** necessary to an orderly transition";[200] and (2) "the time necessary to ***migrate*** to alternative fiber arrangements".[201] There can be no realistic debate that the FCC provided a transition period for exactly that purpose, to have an orderly transition.[202] In fact, this Commission has acknowledged that the FCC "signaled an expectation that the parties will move expeditiously

[199] In addition to these disputes, BellSouth and the CLECs dispute which wire centers in South Carolina are not impaired pursuant to the FCC's impairment tests. BellSouth addresses which wire centers satisfy the test in its discussion of Issue 5, not Issue 2. BellSouth also discusses CompSouth's erroneous fiber-based collocation definition in its discussion of Issue 4.

[200] (*TRRO* at ¶ 143 (DS1/3 transport); ¶ 196 (DS1/3 loops); ¶ 227 (local switching))

[201] (*TRRO* at ¶ 144 (dark fiber transport); ¶ 198 (dark fiber loops)). Tipton Direct at 5 – 6.

[202] *Id.*

away from the specified UNE framework" and "encouraged the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay."[203] The Commission clearly stated that it "plans to do so, with the full expectation and goal that the parties will reach new agreements and have procedures in place to transition new and existing services well before the relevant deadlines recognized by this Commission and the FCC."[204]

Once CLECs have migrated from UNEs to alternative serving arrangements, the rates, terms, and conditions of such alternatives apply.[205] The *TRRO* specifically states that these rates will apply only while the CLEC is leasing the de-listed element from the ILEC during the relevant transition period.[206] The transition rates will thus apply until the earlier of March 10, 2006 (or September 10, 2006 for dark fiber), or the date the de-listed UNEs are converted to the alternative arrangements ordered by the CLEC.[207]

There is no legal basis for including contract language that would allow CLECs to transition from UNEs to state regulated Section 271 services. The FCC has exclusive authority to address the rates, terms, and conditions of BellSouth's Section 271 obligations, and the Commission should reject CLECs' attempts to encourage it to issue an order that improperly addresses those matters. Indeed, in the transition paragraphs of the *TRRO*, the FCC made no mention of transitioning to state regulated Section 271 elements.[208]

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[203] *Order Addressing Petition for Emergency Relief,* Order No. 2005-247 Docket No. 2004-316-C at p.11, ¶5 (Aug. 1, 2005).
[204] *Id.*
[205] Tr. at 335.
[206] *See TRRO* at ¶¶ 145, 198 and 228.
[207] *Id.*
[208] *See TRRO* ¶¶ 142, 195, and 227.

2. **Local Switching and UNE-P**

Relevant Contract Provisions: PAT-1, Sections 4.2, 4.4.2, and 5.4

In establishing transitional language, the Commission should require CLECs to identify their embedded base via spreadsheets and submit orders as soon as possible to convert or disconnect their embedded base of UNE-P or standalone local switching.[209] This will give BellSouth time to work with each CLEC to ensure all embedded base elements are identified, negotiate project timelines, issue and process service orders, update billing records, and perform all necessary cutovers.[210] If a CLEC fails to submit orders to convert UNE-P lines to alternative arrangements in a timeframe that allows the orders to be completed by March 10, 2006, BellSouth will convert remaining UNE-P lines to the resale equivalent no later than March 11, 2006.[211] BellSouth is committed to avoiding any disruption to end users. For any remaining stand-alone switch ports, BellSouth will disconnect these arrangements no later than March 11, 2005, as there is no other tariff or wholesale alternative for stand-alone switch ports.[212]

The Commission must also include the transitional rates contained in the FCC's rules.[213] These rules make clear that transitional switching rates would be determined based on the higher of the rate ***the CLEC paid*** for that element or combinations of elements on June 15, 2004, or the rate the state commission ordered for that element or combination of elements between June 16,

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[209] Tr. at 277-280 (Tipton Direct at 7 – 10). BellSouth initially proposed that such orders be issued by October 1, 2005 and December 9. *Id.* BellSouth is not insisting on these specific dates; BellSouth established these dates by taking the last date of the transition period, then determining how much time it would take to negotiate with CLECs to reach agreement on their embedded base, to reach timelines, and to get orders issued. Since October 1, 2005 has now passed, the Commission should order CLECs to submit orders as soon as possible. Conceivably, the Commission could issue an order that implements BellSouth's proposed December 9 date; if not, BellSouth repeats its request that the Commission order CLECs to submit orders as soon as possible.

[210] *Id.*

[211] *Id.*

[212] *Id.*

[213] *See* 47 C.F.R. 51.319(d)(2)(iii).

2004 and the effective date of the *TRRO*.[214] In most, if not all instances, the transitional rate will be the rate the CLEC paid for the element or combination of elements on June 15, 2004, plus the transitional additive ($1 for UNE-P/Local Switching). For UNE-P, this includes those circuits priced at market rates for the FCC's four or more line carve-out established in the *UNE Remand Order* and affirmed in the *TRO,* n. 1376. To the extent that contracts include a market based price for switching for "enterprise" customers served by DS0 level switching that met the FCC's four or more line carve-out, these terms and rates were included in the interconnection agreements and were in effect on June 15, 2004.[215]

The Commission must reject CompSouth's suggestion that TELRIC rates plus $1 apply to such customers, as the FCC was very clear that for the embedded base of UNE-Ps, the CLECs would pay either the higher of the rates that were in their contracts as of June 15, 2004, or the rates that the state commissions had established between June 16, 2004 and the effective date of the TRRO, plus $1.[216]

3. <u>**DS1 and DS3 High Capacity Loops and Dedicated Transport**</u>

<u>**Relevant Contract Provisions:**</u> PAT-1, Sections 2.1.4 and 6.2

For unimpaired wire centers where the FCC's competitive thresholds are met[217] or impaired wire centers where the FCC's caps apply,[218] the Commission should require CLECs to submit spreadsheets by December 9, 2005 or as soon as possible identifying the embedded base and excess DS1 and DS3 loops and transport circuits to be disconnected or converted to other

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[214] Tr. at 349 (Tipton Rebuttal at 6).

[215] Although BellSouth has the legal right to the transitional additive in addition to the rate in existing interconnection agreements (Tr. at 349 (Tipton Rebuttal at 6); 47 C.F.R. § 51.319(d)(2)(iii)), BellSouth has elected not to apply the additional $1 to previously established market rates for switching.

[216] *Id.*

[217] BellSouth identifies and discusses the wire centers that satisfy the FCC's competitive thresholds in its discussion of Issue 4.

[218] BellSouth and other active parties have agreed that the DS1 transport cap applies to routes for which there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport.

BellSouth services.[219] If a CLEC does not provide notice in a timely manner to accomplish orderly conversions by March 10, 2006, BellSouth will convert any remaining embedded or excess high capacity loops and interoffice transport to the corresponding tariff service offerings.[220]

4. <u>Dark Fiber Loops and Dedicated Transport</u>

<u>Relevant Contract Provisions:</u> PAT-1 Sections 2.8.4 and 6.9.1

Transitional language ordered by the Commission should require CLECs to submit spreadsheets to identify their embedded base dark fiber to be either disconnected or converted to other services by June 10, 2006.[221] If CLECs do not submit orders in a timely manner so that conversions can be completed by September 11, 2006, BellSouth will convert any remaining dark fiber loops or embedded base dark fiber transport to corresponding tariff service offerings.[222]

5. <u>Transition Rates, Term, and Conditions</u>

In addition to including contractual language that requires CLECs to identify their embedded base of customers and that requires timely and orderly steps to effectuate the transition from UNEs to alternative services, the Commission should also require a number of additional steps. While this Commission has allowed CLECs to accept orders for moves, changes and additions of UNE-P customers, CLECS should not be permitted to add new entrance facilities during the transition period.[223] To the extent that a CLEC has added entrance facilities after March 11, 2005, they must be trued up to the appropriate rate as of March 11,

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[219] Tr. at 280 (Tipton Direct at 10).

[220] *Id.* Again, BellSouth is committed to avoiding disruption to end users.

[221] Tr. at 281 (Tipton Direct at 11).

[222] *Id.* BellSouth is committed to avoiding disruption to end users. Dark fiber by its nature is not being used to serve end users.

[223] Tr. at 358-359.

2005 following the execution of an amended interconnection agreement. Also, the transition process must begin and end within the transition period and may not be extended to some later date.[224]

As explained above in connection with switching, the transition rate is the rate the CLEC paid for the element or combination of elements on June 15, 2004, plus the FCC's prescribed transitional additive for that particular element.[225] For UNE switching, the additive is $1.00.[226] For UNE high capacity loops and transport, the additive is 15% of the rate paid (*i.e.,* a rate equal to 115% of the rate paid as of June 15, 2004).[227] Transition period pricing applies for each de-listed UNE retroactively to March 11, 2005.[228] Facilities no longer subject to unbundling shall be subject to true-up to the applicable transition rate upon amendment of the interconnection agreements as part of the applicable change of law process.[229] The transition rates will not go into effect without a contract amendment but once the agreement is amended, the transition rate must be trued-up to the March 11, 2005 transition period start date.[230] The transition rates apply only while the CLEC is leasing the de-listed element from BellSouth during the transition period.[231] Once the de-listed UNE is converted to an alternative service, the CLEC will be billed the applicable rates for that alternative service going forward.[232]

CompSouth suggests that its members are entitled to transitional rates through March 10, 2006 even if they convert to alternative arrangements before that date. However, BellSouth's

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[224] *See South Carolina No New Adds Order,* p. 3; Tr. at 276 (Tipton Dir. at 6).
[225] Tr. at 349.
[226] *Id.*
[227] *Id.*
[228] *Id.* at 354.
[229] *TRRO* n. 408, 524, 630.
[230] *Id.*
[231] Tr. at 354.
[232] *Id.* at 355.

position (that transitional rates no longer apply once a de-listed UNE is converted to an alternative arrangement) was adopted by the Illinois Commerce Commission, which found:

> The Commission disagrees with CLECs that the transition rate should remain in effect for the entire transition period, even if transition is completed before the deadline. The terms of an agreement go into effect at the time the agreement say it does . . . Once the transition has been completed, the agreement takes over with all of its rate, terms, and conditions. The transition rates default only to those UNEs that have not transitioned to an alternate service arrangement.
>
> The Commission does not see how the imposition of agreement rates prior to the expiration of the deadline would somehow adversely affect an otherwise orderly transition. CLECs' argument, that SBC would have the incentive to overstate and exaggerate implementation challenges so as to convert as many UNEs as early as possible, defies logic.[233]

B. <u>Issue 3: Modification and Implementation of Interconnection Agreement Language:</u> *(a) How should existing ICAs be modified to address BellSouth's obligation to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations? (b) What is the appropriate way to implement in new agreements pending in arbitration any modifications to BellSouth's obligations to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations?*

The FCC directed in its *TRRO* that carriers "implement changes to their interconnection agreements consistent with [the FCC's] conclusions [in the TRRO]."[234] Carriers' must, accordingly, execute amendments to their interconnection agreements to remove the availability of de-listed UNEs. Over 99 CLECs in South Carolina have amended or entered into new interconnection agreements to implement the changes in law that are the subject of this proceeding.[235] The Commission should order all CLECs that have not yet executed a *TRO*- and *TRRO*-compliant amendment to their interconnection agreement to execute an amendment with

[233] Illinois Commerce Commission Docket No. 05-0442, *Arbitration Decision,* November 2, 2005, p. 78. BellSouth acknowledges that other state commissions have reached different results on this issue.

[234] *TRRO* at ¶ 233.

[235] Tr. at 113-114 (Blake Reb. at 4-5).

Commission-approved contract language promptly following issuance of the Commission's Order approving such language.[236]

For interconnection agreements that are currently the subject of arbitrations, the Commission should address change-of-law issues in this proceeding and apply its conclusions in those arbitrations. Proceeding in that manner is most efficient in that the Commission will have to address a given issue only once. The same rationale applies to agreements that are being negotiated, but for which no arbitration has yet been filed. The Commission should, therefore, also direct that parties incorporate language approved in this proceeding into their new interconnection agreements.

In prior pleadings in this docket (but not in testimony), NuVox and Xspedius contend that they are special and that as a result of their "abeyance agreement" with BellSouth, they, and only they, should not be required to amend their current interconnection agreements with BellSouth to incorporate the *TRRO*. To the contrary, the so-called "abeyance agreement" between BellSouth and these CLECs does ***not*** mean that these CLECs do not have to implement the *TRRO* until they execute a new interconnection agreement with BellSouth; this Commission addressed this issue finding:

> The Abeyance Agreement simply provides that the parties will continue to operate under their current Commission-approved interconnection agreements until such time as they move into a new agreement either via negotiated agreement or via arbitration pursuant to a subsequent petition for arbitration of a new interconnection agreement. The Agreement says nothing of changes of law that might be mandated by the FCC in the TRRO. In other words, adopting the Joint Petitioners argument would require this Commission to conclude that the scope of the Abeyance Agreement was so wide that even though the TRRO proceeding is never mentioned in the agreement, BellSouth indefinitely agreed to waive contractual rights related to the incorporation of

[236] *See* Tr. at 123-124. As Ms. Blake explained, CLECs that fail to execute Commission approved language promptly after the issuance of an order should be required to operate under a new Attachment 2 that replaces non-*TRO* and *TRRO* compliant language so there is no impediment to meeting the FCC's transitional deadline.

> the TRRO and the current agreements eight months prior to those changes ever being issued. In effect, the Joint Petitioners argue that BellSouth essentially gave up its right to implement those new rules for the current agreement, even before any party knew what those rules would contain. We reject this argument because it impermissibly leads to unreasonable results.[237]

NuVox and Xspedius' claim that they do not have to execute *TRRO*-compliant amendments to their interconnection agreements and are not required to implement the *TRRO* until some unspecified time in the future when they execute a brand new interconnection agreement is without merit. The abeyance agreement does not mention the *TRRO*. Indeed, the abeyance agreement ***pre-dated*** the *TRRO* by approximately eight months. The scope of the abeyance agreement was limited by its terms to changes resulting from *USTA II*. It is not reasonable to believe that eight months before the release of the *TRRO*, and before any party knew what rules would come out of the *TRRO*, BellSouth voluntarily waived its right to amend its interconnection agreement with NuVox and Xspedius to incorporate that order.

The North Carolina Commission also addressed this issue in a manner similar to this Commission. It held in its *North Carolina No New Adds Order* at p. 12 that "the FCC reached out and negated certain existing provisions of all interconnection agreements . . ."

The Commission should confirm that it has rejected, and continues to reject the interpretation of the Abeyance Agreement that NuVox and Xspedius are advocating. That means that if this Commission issues an order in this docket before it issues an arbitration order, NuVox and Xspedius will need to amend their existing agreements. NuVox and Xspedius' argument violates the express terms of the abeyance agreement and is plainly unreasonable. In addition, adopting their position would allow two CLECs, and two CLECs only, to continue to order and pay TELRIC rates for de-listed UNEs until they execute a new interconnection agreement. That would not only permit them to disregard the FCC's express deadlines, but also would unfairly

[237] *South Carolina No New Adds Order* at 9.

permit the two CLECs to have an advantage that other CLECs do not get. For all of these reasons, the Commission should reject NuVox and Xspedius' abeyance agreement argument and order that they, like all other CLECs, must abide by the Commission's No New Adds order and amend their interconnection agreements to be compliant with the *TRO* and *TRRO*.

C. **<u>Issue 4: High Capacity Loops and Dedicated Transport:</u>** *What is the appropriate language to implement BellSouth's obligation to provide Section 251 unbundled access to high capacity loops and dedicated transport and how should the following terms be defined: (i) business line; (ii) fiber-based collocation; (iii) building; (iv) route?*

<u>Relevant Contract Provisions:</u> PAT-1 Sections 1.8, 2.1.4, 2.3, 2.8.4, 6.2-6.7. 6.9; PAT 2 Sections 1.8, 2.1.4, 2.3.6, 2.3.8, 2.3.12, 5.2-5.5, 5.9

To implement BellSouth's Section 251 unbundling obligations, BellSouth's contract language properly cites to the relevant federal rules, and incorporates the FCC's impairment thresholds.[238] BellSouth recognizes its Section 251 obligation to provide unbundled DS1 loops and transport, and unbundled DS3 loops and transport, available except in the instances in which the FCC's impairment tests are satisfied.[239] BellSouth has no obligation to provide unbundled access to entrance facilities, and the CLECs do not contend otherwise.[240] BellSouth has also proposed language that captures the federal requirements concerning dark fiber loops and dark fiber transport.[241] Concerning routes, no party disputes the federal rules provide the applicable definition. To the extent a CLEC orders transport from a Tier 3 wire center to each of two or more Tier 1 or Tier 2 wire centers, and ***connects*** these links together in another Tier 3 wire center, the CLEC has created a route between unimpaired wire centers which should be

[238] Tr. at 285-290. The parties do not dispute that "route" is defined in the federal rules.
[239] *Id.* at 291-296.
[240] *Id.* at 296-297.
[241] *Id.* at 293, 296.

disallowed as gaming.[242] Finally, with respect to EELs, the FCC's impairment tests must be applied to the individual elements comprising an EEL.[243]

The essence of the parties' dispute concerning high capacity loops and transport is not implementing BellSouth's Section 251 obligations; rather, it is effectuating the FCC's impairment tests in a manner that is faithful to the *TRRO*. In terms of the actual definitions that should be included in interconnection agreements, the federal rules should be incorporated.[244] To the extent a term is not defined, such as "building", a definition is not required. For example, BellSouth suggests the Commission simply define building based on a reasonable person standard.[245] Alternatively, if the Commission adopts any definition of building, it should elect to use the definition contained in Pre-filed Testimony of Pamela Tipton, Exhibit PAT-5.[246]

The parties' key dispute in reaching agreed upon definitions centers on CompSouth's proposed fiber-based collocator language, which should be rejected by the Commission. Instead of faithfully including the federal rule, set forth at 47 C.F.R. § 51.5, CompSouth has added self-serving limitations and exclusions that are not contained in the rules. The federal rule, in its entirety, states as follows:

> <u>Fiber-based collocator</u>. A fiber-based collocator is any carrier, unaffiliated with the incumbent LEC, that maintains a collocation arrangement in an incumbent LEC wire center, with active electrical power supply, and operates a fiber-optic cable or comparable transmission facility that (1) terminates at a collocation arrangement within the wire center; (2) leaves the incumbent LEC wire center premises; and (3) is owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC, except as set forth in this paragraph. Dark fiber obtained from an incumbent LEC on an indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable. Two or more affiliated fiber-based collocators in a single wire center shall collectively be counted as a single fiber-based collocator. For purposes

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242 *TRRO* at ¶ 106.
243 Tr. at 297 (Tipton Direct at 27).
244 *See* Tr. a 298-299 *and* Ms. Tipton's exhibits PAT-1 and PAT-2.
245 Tr. at 362 .
246 PAT-5, p. 19.

> of this paragraph, the term affiliate is defined by 47 U.S.C. § 153(1) and any relevant interpretation in this Title.

CompSouth's proposed language improperly adds the language below to the federal definition:

> For purposes of this definition: (i) carriers that have entered into merger and/or other consolidation agreements, or otherwise announced their intention to enter into the same, will be treated as affiliates and therefore as one collocator; provided, however, in the case one of the parties to such merger or consolidation arrangement is BellSouth, then the other party's collocation arrangement shall ***not*** be counted as a Fiber-Based Collocator, (ii) a Comparable transmission Facility means, at a minimum, the provision of transmission capacity equivalent to fiber-optic cable with a minimum point-to-point symmetrical data capacity exceeding 12 DS3s; (iii) the network of a Fiber-Based Collocator may only be counted once in making a determination of the number of Fiber-Based Collocators, notwithstanding that such single Fiber-Based Collocator leases its facilities to other collocators in a single wire center; provided, however, that a collocating carrier's dark fiber leased from an unaffiliated carrier may only be counted as a separate fiber-optic cable from the unaffiliated carrier's fiber if the collocating carrier obtains this dark fiber on an IRU basis.[247]

CompSouth's proposed language seeks to force BellSouth to count AT&T and SBC as one fiber-based collocator, rather than as separate fiber-based collocators. This is not a live dispute in South Carolina, because there are no wire centers in which BellSouth currently counts AT&T and SBC separately. In any event, BellSouth believes that it is appropriate to count AT&T and SBC separately because the *TRRO* has a precise effective date. The FCC set forth its tests to measure the amount of competition present in a given wire center ***at a given time***, and as of the March 10, 2005 effective date of the *TRRO,* AT&T and SBC were ***not*** affiliated companies.[248] Indeed, state commissions that have been faced with this issue declined to count Verizon and MCI, or SBC and AT&T, as one entity.[249]

[247] First Revised Exhibit JPG-1, p. 17.

[248] BellSouth also counts KMC as a fiber-based collocator as of the effective date of the *TRRO*. In South Carolina, KMC's fiber-based collocation arrangements were purchased by TelCove, and TelCove has confirmed that it is a fiber-based collocator in the locations in which BellSouth identified KMC.

[249] *See Rhode Island Order* at 12 – 13; *see also* Order, p. 11, Case No. U-14447, Michigan Public Service Commission, Sept. 20, 2005 ("[i]n the Commission's view, the federal rules do not support the Joint CLECs' position. Contrary to their arguments, the Commission is not free to rewrite the FCC's rules, to improve upon them, or ignore them when arbitrating interconnection agreement terms.") ("Michigan Order").

The Commission should also reject CompSouth's proposed language about counting the network of fiber-based collocators separately. Although this is also a theoretical issue, rather than a live dispute between the parties, it makes perfect sense that a CLEC purchasing fiber from another CLEC can qualify under the federal definition. If one CLEC purchases fiber from another, has terminating fiber equipment, and can use the fiber it purchases to transport traffic in and out of a wire center, it qualifies. CompSouth's proposed definition ignores this reality, and has the potential to lead to gaming. For example, a CLEC or other party could agree to purchase all of the collocation arrangements in a given wire center for some nominal sum, then lease this space back to the previous owners for a paltry amount in exchange for a percentage of the savings the former owners will accrue by paying cost-based UNE rates instead of special access rates.

CompSouth's additional language addressing fiber-based collocation must be rejected as inconsistent with the federal rules and vulnerable to gaming. BellSouth's proposed contract language is fully consistent with the federal rules and should be approved.

D. **Issue 5: Unimpaired Wire Centers:** *(a) Does the Commission have the authority to determine whether or not BellSouth's application of the FCC's Section 251 non-impairment criteria for high-capacity loops and transport is appropriate? (b) What procedures should be used to identify those wire centers that satisfy the FCC's Section 251 non-impairment criteria for high-capacity loops and transport? (c) What language should be included in agreements to reflect the procedures identified in (b)?*

Relevant Contract Provisions: PAT-1 Sections 2.1.4.5.1, 2.1.4.5.2, 2.1.4.9, 2.1.4.10, 6.2.6.1, 6.2.6.2, 6.2.6.7, 6.2.6.8; PAT-2 Sections 2.1.4.2.1, 2.1.4.2.2, 2.1.4.4, 2.1.4.5, 5.2.2.1, 5.2.2.2, 5.2.2.4, 5.2.2.5

1. State Commission Authority

Pursuant to *USTA II,* the FCC may not delegate impairment decisions to state commission.[250] State commissions, however, are charged with resolving disputes arising under interconnection agreements and with implementing the changes to interconnection agreements necessitated by the *TRRO*.[251] As a practical matter, therefore, the Commission must resolve the parties' disputes concerning the wire centers that meet the FCC's impairment tests so that all parties have a common understanding of the wire centers from which CLECs must transition UNEs to alternative arrangements.[252]

2. South Carolina Wire Centers that Currently Satisfy the FCC's Impairment Tests

Listed below, in tabular format, are the wire centers in South Carolina that currently satisfy the FCC's impairment tests[253]:

		Transport		High Capacity Loops	
Wire Center	**Total Business Lines**	**Tier 1**	**Tier 2**	**No Impairment for DS3**	**No Impairment for DS1**
CHTNSCDT	24,703	X			
CHTNSCNO	24,107		X		
CLMASCSA	13,939		X		
CLMASCSN	48,403	X		X	
GNVLSCDT	45,546	X		X	
GNVLSCWR	33,639		X		
MNPLSCES	24,061		X		
SPBGSCMA	22,796		X		

[250] *USTA II* at 574.
[251] *TRRO* at ¶ 234.
[252] Tr. at 299-300.
[253] Hearing Exh. 9; *also* Tr. at 307-308 (Tipton Direct at 37-38) *and* PAT-4.

BellSouth seeks relief in only 8 wire centers.[254] BellSouth requests that the Commission order CLECs to transition existing Section 251 loops and transport (as applicable) in the wire centers listed above to alternative serving arrangements. BellSouth further requests that the Commission make clear that CLECs have no basis to "self-certify" to obtain Section 251 loops and transport in the future in the wire centers above (as applicable). In confirming that the wire centers identified above satisfy the FCC's impairment test, the dispute with CompSouth concerns the application of the FCC's federal rule defining business lines.[255]

As a preliminary matter, the Commission should reject out of hand CompSouth's unfounded claims that the FCC expected a different number of wire centers to satisfy the impairment thresholds it established in the *TRRO*. BellSouth has provided in other proceedings all of its correspondence to the FCC, which is also available as a matter of public record.[256] Notably, the FCC ***specifically asked BellSouth to provide it with updated wire center designations following the issuance of the TRRO.*** The FCC's request demonstrates clearly that the FCC knew precisely what it was doing when it established its business line rule. Any attempt by CompSouth to compare the data BellSouth provided ***before*** the *TRRO* was issued to data it provided ***after the TRRO was issued, at the FCC's express request***, and claim that the results are different than what the FCC expects is flatly wrong.[257]

Concerning business lines, there are two primary areas of dispute. The first is BellSouth's treatment of UNE loops, the second concerns BellSouth's treatment of high capacity loops. In both areas, BellSouth properly implemented the applicable federal rule.

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[254] The offices in which BellSouth requests relief reflect the results of the discovery that it has received from CLECs concerning their identification as fiber-based collocators. This table is not intended to supplant the parties' agreed upon process concerning fiber-based collocation.

[255] *See* 47 C.F.R. § 51.5.

[256] BellSouth will be happy to furnish its correspondence with the FCC to this Commission if it desires that information.

[257] Moreover, the CLECs have raised their concerns with the FCC. The FCC, and not this Commission, should clarify its rule if it deems such a clarification to be necessary.

With respect to including UNE loops, the text of the *TRRO* clearly requires BellSouth to include business UNE-P.[258] BellSouth did so, and the CLECs have not suggested BellSouth should have included residential UNE-P. The CLECs take issue with BellSouth including all other UNE loops. The federal rule requires the

> number of business lines in a wire center [t]o equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements.[259]

The FCC intentionally required all UNE loops (excepting residential UNE-P) to be included, because it gauges "the business opportunities in a wire center, including business opportunities already being captured by competing carriers through the use of UNEs."[260] The CLECs, however, may imply that because BellSouth included ***all*** UNE loops, that it has wrongly included some UNE loops that serve residential customers. Any such implication is flatly contradicted by Mr. Gillan's deposition testimony. Specifically, BellSouth questioned Mr. Gillan about his views of DSO loops, which would be the loop type used to serve residential customers. Mr. Gillan conceded that he did not think it was worth "correcting" BellSouth's business line count to exclude residential DSO loops because "it's such a small number … trying to go into do it correctly wouldn't be worth it. 'Cause you just – you don't know whether or not those lines are used to provide switched business service."[261] Thus, the CLECs cannot legitimately express some disagreement to the Commission with BellSouth's inclusion of all UNE loops – they conceded, even if they have a philosophical disagreement, it is not worth "correcting" the business line data to exclude these lines and that Bellsouth doesn't know if such lines are business lines in any event. More importantly, if the Commission were to disregard

[258] *TRRO* at ¶ 105.
[259] 47 C.F.R. § 51.5
[260] *TRO* at ¶ 105.
[261] Gillan Deposition at 43.

completely some portion, estimate, or percentage of UNE loops, it would ignore the "opportunity" present in a particular wire center. The FCC's language is clear and it is logical given the FCC's purpose in evaluating the opportunity in a wire center.

The Commission should also reject the CLECs' attempts to improperly lower the business line count that BellSouth has provided. Mr. Gillan's suggestion that the Commission must undertake some calculation or estimate to capture "switched" UNE loops is nonsense. Mr. Gillan concedes there is no source that would provide data concerning which UNE loops are switched as compared to loops that are not switched.[262]

Indeed, Mr. Gillan conceded at a similar docket in Tennessee under questioning from a Commissioner that even his CLEC clients could not provide such data:

> DIRECTOR TATE Q. Okay. And so the difference in the actual and the potential capacity you spoke about a few minutes ago, like maybe you just wouldn't know that someone was utilizing all of the capacity?
>
> MR. GILLAN A. Yes, for the CLEC. Here's – if BellSouth is serving the customer, it gives them this pipe and then it knows how many lines the customer is actually purchasing on the pipe. If for that same customer the CLEC wins the customer and then the CLEC buys the pipe, well, now BellSouth has given the pipe to the CLEC and so BellSouth's billing records don't tell it how many lines the CLEC is selling the customer. Now, I don't think it makes any sense that the business line count changes based on whether the incumbent serves the customer or the CLEC serves the customer. What changes is how easy it is for BellSouth to calculate the number.
>
> * * * *
>
> DIRECTOR TATE Q. And it's just impossible, impracticable for you-all to be able to provide an exact number or for the CLECs?
>
> MR. GILLAN A. It becomes – it becomes impractical. We're trying to do it with just the CompSouth members and then partially it was all of their billing systems look different. Some of them don't collect the information at all in this form. Even if I had gotten the information – I never would have gotten the information from all of them. I would have gotten it from one or two of them, and then I would have been accused of whether those were representative. So I just don't

[262] Tr. at 543; Gillan Deposition at 44.

think it's – at first that's how I thought – my thinking was going down the line you were thinking.

> * * * *

> DIRECTOR TATE Q. But you-all would – the CLECs would know that exact[ly] because how they're billing their customers is based on those lines?

> MR. GILLAN A. Not always. See, here's the problem. If I'm – some CLECs might be selling the customer service that is just six business lines and all data and they may call that Advantage, you know, whatever. And they bill the customer for Advantage, and then they don't have in their billings system how that product was split between voice and data. That was the problem I was running into. Unless the CLEC product and the CLEC billing systems were designed to track business lines, which they weren't, there was no way to collect the data from many of them, and then it was almost impossible to collect data from CLEC A that you knew was comparable to what you were getting from CLEC B, etc.[263]

Moreover, his testimony flatly contradicts the FCC's intent to capture, with its business line test, an accurate measurement of the revenue ***opportunity*** in a wire center.[264] Indeed, considering the FCC was very clear that it wished to avoid a "complex" test, or a test that would be subject to "significant latitude,"[265] it is difficult to imagine any useful purpose – other than obtaining UNEs when no impairment exists – served by Mr. Gillan's complex proposed estimates and assumptions.

To limit the number of lines as Mr. Gillan suggests is not only contrary to the FCC's intent to capture ***opportunity,*** it flies squarely against the revised impairment standard of the *TRRO* which considers, in part, whether requesting carriers can compete without access to particular network elements.[266] Likewise, the revised impairment standard requires consideration of ***all*** the revenue opportunity that a competitor can reasonably expect to gain over

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[263] TRA Docket No. 04-00381, Transcript of proceedings, Wednesday, September 14, 2005, Vol. IV, pp. 124-129.

[264] *TRRO* at ¶ 104.

[265] *TRRO,* ¶ 99

[266] *TRRO* at ¶ 22.

facilities it uses, from all possible sources.[267] Thus, the business line test is designed as a "proxy" for gauging the competitive opportunities, and if the Commission consciously excludes some portion of UNE loops under the misguided notion that because they are not "switched" they should not qualify, it ignores completely the competitive opportunity and potential present in the UNE loops. A CLEC has the choice to provide all voice (or switched) services over a loop, or it can opt to provide a mixture of voice and data services. That does not mean that a CLEC needs continued access to UNEs simply because it serves customers using a bundled offering. Instead, excluding an estimated number of UNEs because some unknown number of CLECs provide data would only serve to improperly evaluate impairment with reference to a particular CLEC's business strategy, which would be unlawful.[268]

The Illinois Commerce Commission issued a decision on this issue on November 2, 2005, and used line count data in the manner BellSouth presented. It ruled that

> [t]he data the FCC relied upon is based on ARMIS 43-08 business lines, business UNE-P, plus UNE . . . loops. Altering those business counts after the thresholds have been established renders the impairment determinations inconsistent with the FCC's findings. The FCC's definition of business lines specifically includes 'the sum of all incumbent LEC business switched access line, plus *the sum of all UNE loops* connected to that wire center, including UNE loops provisioned in combination with other unbundled elements . . . . ***The phrase 'all UNE loops' encompasses residential customers and non-switched services.***[269]

In doing so, it expressly rejected the adjustments that CompSouth advocates here. Likewise, in rejecting other proposed adjustments, the Michigan Public Service Commission ruled

> the *TRRO* requires that the line count include each Centrex line as one line, without a factor to reduce the number to one ninth. There is no provision in those rules or the *TRRO* that would permit the reduction by the Centrex equivalency factor as proposed by the CLECs. If the parties believe that such an equivalency

[267] *Id.* at 24.
[268] *TRRO,* ¶ 25.
[269] Illinois Commerce Commission Docket No. 05-0442, *Arbitration Decision,* November 2, 2005, p. 30 (citations omitted) (first emphasis in original) (second emphasis added).

factor is appropriate for use in the impairment analysis, they must prevail on that argument before the FCC.[270]

The federal rule also very clearly requires ISDN and other digital access lines, whether BellSouth's lines or CLEC UNE lines, to be counted at their full system capacity; that is, each 64 kbps-equivalent is to be counted as one line.[271] The FCC rule plainly states that "a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 'business lines.'"[272] The FCC has made clear its "test requires ILECs to count business lines on a voice grade equivalent basis. In other words, a DS1 loop counts as 24 business lines, not one."[273] On cross-examinations, Mr. Gillan conceded that "[t]here's no question that there's the potential for 24 lines in DS1."[274] Despite this recognition, however, Mr. Gillan would improperly limit business lines by discarding the potential customers CLECs can serve. CompSouth's position contravenes the FCC's intent to evaluate and capture potential.

In contrast to Mr. Gillan, BellSouth's witness Ms. Tipton provided a clear explanation of BellSouth's careful application of the FCC's instruction on how to count business lines.[275] For their part, the CLECs' witness Mr. Gillan urged that the counting process laid out by the FCC and followed by BellSouth was not good enough and that the Commission should instead engage in a process of estimating based on certain assumptions rather than simply counting the items outlined in the FCC's rule. This Commission should reject CompSouth's attempt to make it "estimate" business lines.

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[270] *In re: Commission's own Motion to Commence a Collaborative Proceeding to Monitor and Facilitate Implementation of Accessible Letters Issued by SBC Michigan and Verizon,* 2005 Mich. PSC LEXIS 310, Order at * 13.

[271] 47 C.F.R. § 51.5.

[272] *Id.*

[273] *See* Sept. 9, 2005, Br. for the FCC Respondents, United States Court of Appeals, D.C. Cir. No. 05-1095.

[274] SC. Tr. at 543.

[275] Tr. at 302-306.

To the extent CompSouth may imply in its post-hearing filings that BellSouth's business line results are inconsistent with BellSouth's financial reporting, such claims must be rejected. BellSouth has provided CompSouth with data that shows clearly that its financial reporting and line count data are consistent.[276] CompSouth simply prefers to disregard reality, and focus on its misguided attempts to obtain unbundling in circumstances in which it is not entitled to UNEs. Likewise, any post-hearing attempt to inject some uncertainty concerning BellSouth's Form 477 reporting made to the FCC cannot pass muster. BellSouth's has recently provided the FCC updated Form 477 data to eliminate any prior confusion on CompSouth's part concerning its reporting of EELs (Enhanced Extended Links").[277] EELs are not explicitly required to be reported in the FCC Form 477 data and BellSouth had not historically included EELs in its Form 477 reporting, although it has refiled its reports to eliminate any concerns. BellSouth's business line data fully comports with the FCC's directives and with other reports filed with the FCC.[278]

3. <u>Identifying Wire Centers in the Future that Satisfy the FCC's Impairment Tests</u>

To the extent wire centers are later found to meet the FCC's no impairment criteria, BellSouth will notify CLECs of these new wire centers via a Carrier Notification Letter. The non-impairment designation will become effective ten business days after posting the Carrier Notification Letter. Beginning on the effective date, BellSouth would no longer be obligated to offer high capacity loops and dedicated transport as UNEs in such wire centers, except pursuant to the self-certification process. This means that if a CLEC self certifies, BellSouth will process the order, subject to its right to invoke the dispute resolution process if BellSouth believes the self certification is invalid. High capacity loop and transport UNEs that were in service when

[276] If the Commission desires this information, BellSouth will be happy to furnish it upon request.
[277] Again, if the Commission desires this information, BellSouth will furnish it.
[278] Tr. at 302-306.

the subsequent wire center determination was made will remain available as UNEs for 90 days after the effective date of the non-impairment designation. This 90 day period is referred to as the "subsequent transition period." No later than 40 days from effective date of the non-impairment designation, affected CLECs must submit spreadsheets identifying their embedded base UNEs to be converted to alternative BellSouth services or to be disconnected. From that date, BellSouth will negotiate a project conversion timeline that will ensure completion of the transition activities by the end of the 90-day subsequent transition period. BellSouth's future wire center identification process has been agreed to with a number of CLECs,[279] and the Commission should adopt it here.

CompSouth has proposed a different means for identifying future wire centers that would resolve any disputes relating to BellSouth's subsequent wire center identification within ninety days after BellSouth's initial filing.[280] BellSouth has no conceptual objection to the Commission resolving future disputes, as shown on BellSouth Pre-filed Testimony of Pamela Tipton, Exhibit PAT-5; BellSouth, however, is unwilling to agree to a process that limits its right to designate future wire centers on an annual basis. Nothing in the federal rules supports this limitation. Moreover, CompSouth's proposed process improperly inserts a number of qualifications to the data that it seeks from BellSouth, which impose CompSouth's erroneous views on the business line definition into the process. It bears repeating that BellSouth has been successful at resolving this on a commercial basis, an option the Commission could elect here. If the Commission establishes any future process, it must reject CompSouth's annual filing and data limitations, as reflected on BellSouth Pre-filed Testimony of Pamela Tipton, Exhibit PAT-5.

E. **<u>Issue 9: Conditions Applicable to the Embedded Base</u>** *What conditions, if any, should be imposed on moving, adding, or changing orders to a CLEC's respective*

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[279] *See, e.g.,* Tr. at 113 (99 CLECs in South Carolina have TRRO compliant language).
[280] Tr. at 442-443.

embedded bases of switching, high-capacity loops and dedicated transport, and what is the appropriate language to implement such conditions, if any?

Relevant Contract Provisions: BellSouth's Proposed Order includes language consistent with this Commission's *No New Adds Order* at PAT -1 Section 5.4.3.2.

This Commission addressed this issue in its *South Carolina No New Adds Order*. BellSouth is currently complying with that order.[281] BellSouth notes that state commissions have addressed this issue differently –this Commission determined the embedded base is defined as customers, while other commissions, like Florida, consider the embedded base in relation to UNE arrangements in place on March 11, 2005.[282]

Changes to existing service do not require a new service order. BellSouth will process orders to modify an existing customer's service by, for example, adding or removing vertical features, during the transition period.[283]

In order to submit an order for a high-capacity loop or transport UNE, a CLEC must self-certify, based on a reasonably diligent inquiry, that it is entitled to unbundled access to the requested element.[284] BellSouth must process the request.[285] It may only subsequently challenge the validity of such order(s) pursuant to the dispute resolution provision in the parties' interconnection agreement.[286]

In accordance with the *TRRO*, BellSouth has been accepting and processing CLEC orders for new high-capacity loops and dedicated transport even in those wire centers and for those routes that BellSouth has identified as areas where CLECs are not impaired pursuant to the competitive thresholds the FCC set forth in the TRRO.[287] At the conclusion of this proceeding,

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[281] Tr. at 99, 359.

[282] *See* Order No. PSC-05-1127-FOF-TP, Florida Docket No. 041269-TP (Nov. 8, 2005), p. 6 ("[w]hile CLECs retain access to unbundled local switching during the 12-month transition period for their embedded end-user customers, that access is limited to the arrangement existing on March 11, 2005. Orders requiring a new UNE-P arrangement, such as a customer move to another location or an additional line, are not permitted pursuant to the FCC's *TRRO*."). BellSouth's position is that the embedded base is defined in relation to UNE arrangements.

[283] *Id.*

[284] *TRRO* at ¶ 234.

[285] *Id.*

[286] *Id.*

[287] Tr. at 300-301. As Ms. Tipton explained, CLECs have placed orders in other states – not South Carolina.

however, the Commission should confirm the South Carolina wire centers that satisfy the FCC's impairment tests. Once the South Carolina wire centers are confirmed, CLECs have no basis whatsoever to "self-certify" orders for high capacity loops and dedicated transport in the confirmed wire centers. If BellSouth is to follow the FCC directives, and it will, the Commission must eliminate future disputes by requiring CLECs to abide by its wire center confirmation.

F. Issue 10: Transition of De-listed Network Elements To Which No Specified Transition Period Applies: *What rates, terms, and conditions should govern the transition of existing network elements that BellSouth is no longer obligated to provide as Section 251 UNEs to non-Section 251 network elements and other services and (a) what is the proper treatment for such network elements at the end of the transition period; and (b) what is the appropriate transition period, and what are the appropriate rates, terms and conditions during such transition period, for unbundled high capacity loops, high capacity transport, and dark fiber transport in and between wire centers that do not meet the FCC's non-impairment standards at this time, but that meet such standards in the future?*

Relevant Contract Provisions: PAT-1 Section 1.7 and 4.1; PAT-2 Section 1.7

BellSouth has addressed the rates, terms and conditions for elements de-listed by the *TRRO* and which have a designated transition period, including those identified in subpart (b) above, in connection with its discussion of Issue 2. In addition to taking steps to transition away from elements de-listed by the *TRRO,* the FCC removed significant unbundling obligations in the *TRO,* including, entrance facilities, enterprise or DS1 level switching, OCN loops and transport, fiber to the home, fiber to the curb, fiber sub-loop feeder, line sharing and packet switching.[288]

Because the FCC eliminated the ILECs' obligation to provide unbundled access to these elements 2 years ago in the *TRO*, CLECs that still have the rates, terms and conditions for these elements in interconnection agreements have reaped the benefits of unlawful unbundling of these

[288] Tr. at 313.

elements for far too long.[289] As such, with the exception of entrance facilities, which BellSouth will agree to allow CLECs to transition with their embedded base and excess dedicated transport, BellSouth should be authorized in the terms of the interconnection agreement, to disconnect or convert such arrangements upon 30 days written notice absent a CLEC order to disconnect or convert such arrangements.[290] BellSouth should also be permitted to impose applicable nonrecurring charges.[291] To do otherwise will incent these CLECs to simply refuse to act in order to further delay implementation of the *TRO.* BellSouth's proposed contract language is fully consistent with the *TRO* and should be approved.

G. Issue 11: UNEs That Are Not Converted: *What rates, terms and conditions, if any, should apply to UNEs that are not converted on or before March 11, 2006, and what impact, if any, should the conduct of the parties have upon the determination of the applicable rates, terms, and conditions that apply in such circumstances?*

Relevant Contract Provisions: PAT-1 Sections 4.2.5, 4.2.6, 5.4.3.5, 5.4.3.6, 2.1.4.11, 2.8.4.7, 6.2.6.9, 6.9.1.9

The *TRRO* makes clear that CLECs must transition their entire embedded base of switching and high capacity loops and transport by March 10, 2006, and not after that date.[292] To accomplish this, and to minimize disruption to end users, BellSouth needs CLECs to timely provide it with information concerning their plans for these services.

BellSouth is asking CLECs to identify their embedded base UNE-Ps as soon as possible and to submit orders to disconnect or convert the embedded base in a timely manner so as to complete the transition process by March 10, 2006.[293] If CLECs fail to submit orders in a timely manner, BellSouth should be permitted to identify all such remaining embedded base UNE-P

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289 *Id.*
290 Tr. at 314.
291 *Id.*
292 Tr. at 315-316.
293 Tr. at 316.

lines and convert them to the equivalent resold services no later than March 10, 2006, subject to applicable disconnect charges and the full nonrecurring charges in BellSouth's tariffs.[294] Absent a commercial agreement for switching, the Commission should allow BellSouth to disconnect any stand alone switching ports which remain in place on March 11, 2006.[295] To do otherwise will incent CLECs to simply refuse to act in order to delay implementation of the *TRRO* by the FCC's deadline.

For high capacity loops and dedicated transport, BellSouth is requesting CLECs submit spreadsheets by December 9, 2005 or as soon as possible to identify and designate transition plans for their embedded base of these de-listed UNEs.[296] If CLECs fail to submit such spreadsheets, BellSouth should be permitted to identify such elements and transition such circuits to corresponding BellSouth tariffed services no later than March 10, 2006, subject to applicable disconnect charges and full nonrecurring charges in BellSouth's tariffs.[297]

For dark fiber, BellSouth is requesting that CLECs submit spreadsheets to identify and designate plans for their embedded base dark fiber loops and de-listed dark fiber transport to transition to other BellSouth services by June 10, 2006.[298] If a CLEC fails to submit such spreadsheets, BellSouth should be allowed to identify all such remaining embedded dark fiber loops and/or de-listed dark fiber dedicated transport and transition such circuits to the corresponding BellSouth tariffed services no later than September 10, 2006, subject to applicable disconnect charges and full nonrecurring charges set forth in BellSouth's tariffs.[299] BellSouth's

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[294] *Id.*
[295] *Id.*
[296] Tr. at 317.
[297] Tr. at 317-318.
[298] *Id.*
[299] *Id.*

proposals are reasonable. The CLECs should not be permitted to wait until the "eleventh hour" to implement the FCC ordered transition mechanisms.

H. <u>Issue 32: Binding Nature Of Commission Order:</u> *How should the determinations made in this proceeding be incorporated into existing § 252 interconnection agreements?*

It is important that, at the end of this proceeding, the Commission approves specific contractual language that resolves each disputed issue and that such contract language can be promptly executed by the parties, unless otherwise agreed to, so that the FCC's transitional deadlines are met. The Commission has correctly recognized that the FCC's transitional periods for UNE switching and high capacity loops and dedicated transport cannot be extended beyond March 10, 2006.

BellSouth requests that in order to ensure that a smooth transition, the Commission order that promptly following, but in no event more than 45 days of its written order approving contract language, that parties must execute compliant amendments (*i.e.,* those that track the Commission language, unless otherwise mutually agreed to) to their interconnection agreements. The Commission should make clear that if an amendment is not executed within the allotted timeframe, the Commission's approved language will go into effect for all CLECs in the state of South Carolina, regardless of whether an amendment is signed.

III. <u>Service-Specific Issues (13, 15, 16, 29, 31)</u>

A. <u>Issue 13: Performance Plan:</u> *Should network elements de-listed under section 251(c)(3) be removed from the SQM/PMAP/SEEM?*

Elements that are no longer required to be unbundled pursuant to Section 251(c)(3) should not be subject to a SQM/PMAP/SEEM plan. The SQM/PMAP/SEEM plan was established to ensure that BellSouth would continue to provide nondiscriminatory access to elements required to be unbundled under section 251(c)(3) after BellSouth gained permission to provide in-region interLATA service. If BellSouth fails to meet measurements set forth in the plan, it must pay a monetary penalty to a CLEC and/or to the State. Section 251(c)(3) elements are those elements which the FCC has determined are necessary for CLECs to provide service and without access to the ILEC's network, the CLEC would be impaired in its ability to do so.

When making the determination that an element is no longer "necessary" and that CLECs are not "impaired" without access to an ILEC's UNE, the FCC found that CLECs were able to purchase similar services from other providers. These other providers are not required to perform under a SQM/PMAP/SEEM plan. To continue to impose upon BellSouth a performance measurement, and possible penalty, on competitive, commercial offerings is discriminatory and anticompetitive. For commercial offerings, the marketplace, not a SQM/PMAP/SEEM plan, becomes BellSouth's penalty plan. If BellSouth fails to meet a CLEC's provisioning needs, such CLEC can avail itself of other providers of the service and BellSouth is penalized because it losses a customer and associated revenues.[300]

More than 150 CLECs have entered into commercial agreements to purchase BellSouth's wholesale local platform services. Those agreements make available to CLECs a service similar to the UNE-P, but at commercial rates, not rates imposed by a regulator.[301] Those CLECs, which include members of CompSouth, are satisfied with the penalties and remedies in the commercial agreement and were willing to forgo any SQM/PMAP/SEEM penalty payments should BellSouth fail to perform in accordance with the parties' agreement.[302]

The Georgia Commission recently entered an *Order Adopting Hearing Officer's Recommended Order*, dated June 23, 2005, in Docket No. 7892-U, in which it approved a Stipulation Agreement reached between BellSouth and several CLEC parties which included the following provisions:

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[300] Tr. at 102-104.
[301] Tr. at 112-133.
[302] Tr. at 103.

1. All DS0 wholesale platform circuits provided by BellSouth to a CLEC pursuant to a commercial agreement are to be removed from the SQM Reports; Tier 1 payments; and Tier 2 payments starting with May 2005 data.

2. The removal of DS0 wholesale platform circuits as specified above will occur ***region-wide***.

3. All parties to this docket [the Performance Measurements' docket] reserve the right to make any arguments regarding the removal of any items other than the DS0 wholesale platform circuits from SQM/SEEMs in Docket No. 19341-U [the Generic Change of Law docket] to the extent specified in the approved issues list.[303]

This regional Stipulation was endorsed by a number of CLECs, including AT&T, Covad, MCI and DeltaCom, all of whom are CompSouth member. There is no legitimate reason that de-listed UNEs should be a part of a UNE performance measurements and penalty plan. To not remove such de-listed UNEs from the plan is anticompetitive and unfair to BellSouth.

B. Issue 15: Conversion of Special Access Circuits to UNEs: *Is BellSouth required to provide conversion of special access circuits to UNE pricing, and, if so, at what rates, terms and conditions and during what timeframe should such new requests for such conversions be effectuated?*

Relevant Contract Provisions: PAT-1, Sections 1.6, 1.13; PAT-2, 1.6, 1.13

BellSouth will convert special access services to UNE pricing, subject to the FCC's service eligibility requirements and limitations on high-cap EELs, once a CLEC's contract has these terms incorporated in its contract.[304] BellSouth will also convert UNE circuits to special access services. Special access to UNE conversions should be considered termination of any applicable volume and term tariffed discount plan or grandfathered arrangements.[305] The

[303] Tr. at 104.
[304] Tr. at 327.
[305] *Id*.

testimony before the Commission included the following proposed rates. For the first single DS1 or lower capacity loop conversion on an LSR should be $24.88 and $3.51 per loop for additional conversions on that LSR.[306] For a project consisting of 15 or more loops submitted on a single spreadsheet, the rate should be $26.37 for the first loop and $4.99 for each additional loop on the same LSR.[307] For DS3 and higher capacity loops and for interoffice transport conversions, the rate should be $40.27 for the first single conversion on an LSR and $13.52 per loop for additional single conversions on that LSR.[308] For a project consisting of 15 or more such elements in a state submitted on a single spreadsheet, BellSouth is proposing $64.07 for the first loop and $25.63 for each additional loop conversion on the same spreadsheet.[309] The Commission-ordered rate of $5.61 should apply for EEL conversions, until new rates are issued.[310] If physical changes to the circuit are required, the activity should not be considered a conversion and the full nonrecurring and installation charges should apply.[311]

Mr. Gillan did not file any direct or rebuttal testimony addressing Issue 15.[312] In prior filings, CompSouth has taken exception to BellSouth's rates, claiming they are not "supported by a cost study."[313] This claim is not accurate. During the first generic change of law hearing in

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[306] *Id.*
[307] *Id.*
[308] *See* Tr. at 328. BellSouth recently updated the rates for DS3 and higher capacity loops and interoffice transport conversions that it will offer its wholesale customers in its standard interconnection agreement, which is posted at www.interconnection.bellsouth.com. The DS3 rates set forth in Ms. Tipton's testimony mirrored the rates that were in BellSouth's standard interconnection agreement at the time of this proceeding. The updated DS3 rates that are currently in BellSouth's standard interconnection agreement are: $36.69 for the first single conversion on an LSR, $16.06 per loop for additional single conversions on that LSR, $38.17 for the first loop on a project consisting of 15 or more such elements in a state submitted on a single spreadsheet, and $17.54 for each additional loop conversion on that same spreadsheet.
[309] Tr. at 328.
[310] *Id.*
[311] *Id.*
[312] Gillan Deposition at 77.
[313] *See, e.g., CompSouth's Post-Hearing Brief,* filed in North Carolina Docket P-55, Sub 1549 (Nov. 8, 2005), p. 78; *and CompSouth's Post-Hearing Brief,* filed in Alabama Docket 29543 (Nov. 4, 2005), p. 79. CompSouth filed these briefs after acknowledging Ms. Tipton's Georgia testimony in which she explained BellSouth's rates were based on a recent cost study. *See Joint CLEC Post-Hearing Brief,* filed in Georgia Docket No. 19341-U (Oct. 21, 2005), p. 80.

Georgia, Ms. Tipton explained that commission, like other state commissions in BellSouth's region, had not previously set single element conversion rates.[314] As a result, BellSouth conducted a TELRIC cost study resulting in proposed rates.[315] Indeed, Ms. Tipton's testimony in Georgia was filed on July 19, 2005, and CompSouth could have pursued discovery to inquire as to the basis for BellSouth's proposed rates. CompSouth elected not to request any cost study, and, to BellSouth's knowledge, there is no requirement that parties must submit cost studies whenever rates are proposed. In any event, Ms. Tipton's testimony is before the Commission for consideration. CompSouth cannot legitimately suggest that this Commission is precluded from establishing conversion rates simply because it chose not to pursue discovery. The Commission should adopt BellSouth's proposed language, including its proposed rates, rather than CompSouth's. Indeed, only slight variations exist in the contract language.[316]

C. <u>Issue 16: Pending Conversion Requests:</u> *What are the appropriate rates, terms, conditions and effective dates, if any, for conversion requests that were pending on the effective date of the TRO?*

<u>Relevant Contract Provisions:</u> Neither BellSouth nor CompSouth propose specific language on this issue. The parties' dispute concerns CLECs' unfounded claims for retroactive conversion rights. *See* BellSouth Pre-filed Testimony of Pamela Tipton, Exhibit PAT-5.

The contract language contained in a CLEC's interconnection agreement at the time the *TRO* became effective governs the appropriate rates, terms, conditions and effective dates for conversion requests that were pending on the effective date of the *TRO*.[317] ***Conversion rights,***

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[314] Georgia Public Service Commission Transcript of Hearing, Docket No. 19341-U, August 31, 2005, pp. 720-721.

[315] *Id.*

[316] Tipton Rebuttal at 35.

[317] Tr. at 329, 377-378.

rates, terms and conditions are not retroactive and become effective once an interconnection agreement is amended.[318]

Mr. Gillan did not file any direct testimony addressing Issue 16.[319] In his rebuttal testimony, Mr. Gillan claimed that conversion language and rights must be retroactive to March 11, 2005, the effective date of the *TRRO.*[320] This testimony is incorrect, and plainly inconsistent with the *TRO* and the *TRRO.*

CompSouth attempts to portray this issue as "vital" to CLECs.[321] This portrayal cannot stand and is belied by the actions of the very CLECs that are complaining. BellSouth attempted to implement changes in law, including contract language that would have allowed CLECs to convert from special access services to UNEs following the *TRO,* yet many CLECs have not agreed to contract language that includes such provisions. It is not surprising that these CLECs elected to wait, given that the *TRO* as a whole eliminated access to UNEs including entrance facilities, enterprise or DS1 level switching, OCN loops and transport, fiber to the home, fiber to the curb, fiber sub-loop feeder, line sharing and packet switching. CLECs that did not execute *TRO* amendments have presumably decided that it was to their benefit to retain these de-listed UNEs in lieu of obtaining conversion rights. In any event, the retroactive true-up that BellSouth seeks as a result of the de-listed elements in the *TRRO* is explicitly contained in that Order and the federal rules.[322] Retroactive conversion rights were not contemplated in the *TRO,* instead, the FCC made clear that "carriers [were] to establish any necessary timeframes to perform conversions in their interconnection agreements or other contracts."[323] This is precisely the

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318 *Id.*
319 Gillan Deposition at 77.
320 Tr. at 515.
321 Tr. at 516.
322 *TRRO,* notes 408, 524, 630 *and* 47 C.F.R. 51.319(a)(4)(iii), 51.319(d)(2)(iii), 51.319(e)(2)(ii)(C).
323 *TRO* at ¶ 588.

conclusion the Massachusetts and Rhode Island commissions reached when confronted with this issue.[324]

D. Issue 29: Enhanced Extended Link ("EEL") Audits: *What is the appropriate ICA language to implement BellSouth's EEL audit rights, if any, under the TRO*?

Relevant Contract Provisions: PAT-1, Section 5.3.4.3; PAT-2, Section 4.3.4.3

This issue concerns the appropriate language concerning EEL audit rights. By way of background, CLECs are entitled to convert special access circuits (to which tariffed prices apply) to unbundled combinations of loops and transport, commonly known as EELs (to which UNE prices apply). A CLEC can convert by self-certification, and BellSouth must accept a CLEC self-certification as accurate. The balance created by federal law is that BellSouth has a right to audit a CLECs' records to ensure the CLEC is actually entitled to the unbundled EELs.

BellSouth's proposed language allows it to audit CLECs on an annual basis to determine compliance with the qualifying service eligibility criteria, and requires BellSouth to obtain and pay for an independent auditor who will conduct the audit pursuant to American Institute for Certified Public Accountants ("AICPA") standards.[325] The auditor determines material compliance or non-compliance.[326] If the auditor determines that CLECs are not in compliance, the CLECs are required to true-up any difference in payments, convert noncompliant circuits and make correct payments on a going-forward basis.[327] Also, CLECs determined by the auditor to have failed to comply with the service eligibility requirements must reimburse the ILEC for the

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324 *See Massachusetts Arbitration Order,* p. 135; *see also Arbitration Decision,* In re: Petition of Verizon-Rhode Island for Arbitration of an Amendment to Interconnection Agreements with CLECs and CMRS Providers in Rhode Island to Implement the Triennial Review Order and Triennial Review Remand Order, Docket No. 3588, (November 10, 2005), p. 30 ("Paragraph 589 [of the *TRO*] does not contain any clear FCC mandate that pricing for conversions begin on the effective date of the *TRO,* which was October 2, 2003. Accordingly, the pricing for these conversions does not take effect until the ICA amendment goes into effect").

325 Tr. at 334-335.

326 *Id.*

327 *Id.*

cost of the auditor.[328] BellSouth should not be required to agree to terms that would add delay and expense to audits, such as: a requirement to show cause prior to the commencement of an audit, incorporation of a list of acceptable auditors in interconnection agreements, or a requirement that parties must agree on the auditor.[329] Finally, to the extent that an auditor determines that a CLEC's noncompliance is material in one area, the CLEC would be responsible for the cost of the audit even if each of the other criteria has been met to the auditor's satisfaction.[330]

In contrast to BellSouth's proposed language, CompSouth's contract language goes well beyond the FCC's requirements.[331] The essential dispute between the parties is that CompSouth claims that BellSouth must show cause to the CLEC before it can begin an audit.[332] The trouble with such language is that requiring BellSouth to show cause before ever beginning an audit enables the audited CLEC to unreasonably dispute, and therefore delay, the audit.[333] BellSouth has difficulties throughout its region with auditing one of CompSouth's members, NuVox.[334] BellSouth has a pending audit complaint before this Commission, and similar proceedings are pending, in five other states.[335] CompSouth's witness Mr. Gillan acknowledged on cross examination in Tennessee that, while he proposed contract language in his testimony, he was unfamiliar with the history of BellSouth's EELs disputes saying "I mean, I'm aware they are going on, I just don't know the specifics."[336] Likewise, in his deposition, Mr. Gillan blithely claimed that BellSouth and CLECs could mutually agree on an auditor before an audit takes

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[328] *Id.*
[329] Tr. at 335-336.
[330] Tr. at 337-338.
[331] Tr. at 379.
[332] Gillan Deposition at 84.
[333] Tr. at 379.
[334] *See* Docket No. 2005-82-C, pending before this Commission.
[335] *See* September 7, 2005 letter filed in Docket No. 2005-82-C. BellSouth requests the Commission take administrative notice of this proceeding.
[336] TRA Docket No. 04-00381, Transcript of proceedings, Wednesday, September 14, 2005, Vol. IV, p. 64.

place.[337] Mr. Gillan's claim is not credible, particularly in light of the fact that he was not aware of any specifics of BellSouth's dispute with CompSouth's member company NuVox.

The reality is that including a requirement to show "cause" before an audit can begin will allow the party being audited to dispute whether the cause provided is sufficient, all the while delaying an audit. Such pre-audit disputes can grind any effort to audit to a complete halt. Moreover, BellSouth has no reason to seek to audit a CLEC without cause.[338] Since BellSouth must pay for the audit, inserting "for cause" contractual language is unnecessary.[339] In contrast, if the CLECs succeed in inserting "cause" language, then instead of completing an audit timely, when records are fresh, CLECs can obstruct the audit from taking place all the while enjoying lower TELRIC rates to which they may not be entitled. The Florida Public Service Commission recently addressed this issue, and adopted the recommendation of its staff which found "Verizon need not identify the specific circuits that are to be audited or provide additional detailed documentation. If Verizon or a CLEC has any concern with any portion of the audit, it may dispute the audit under the dispute resolution procedures contained in the interconnection agreement."[340] This Commission should reach a similar result here.

Indeed, despite the shortcomings in CompSouth's language, BellSouth is willing to accept a reasonable middle ground, as reflected in BellSouth Pre-filed Testimony of Pamela Tipton, Exhibit PAT-5. The Commission must keep in mind that CLECs can self-certify to obtain access to EELs. BellSouth's proposed audit language simply strikes the appropriate balance fashioned by the FCC. The CLECs' attempt to curtail BellSouth's audit language is

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[337] Gillan Deposition at 85.

[338] TRA Docket No. 04-00381, Transcript of proceedings, Wednesday, September 14, 2005, Vol. III, pp. 239-240.

[339] Tr. at 379.

[340] Florida Docket No. 040156-TP, September 22, 2005 Staff Recommendation, p. 175. The Florida Commission adopted this recommendation at its November 1, 2005 agenda session. A written order is not yet available.

simply an effort to frustrate BellSouth's legitimate audit rights, and the Commission should adopt the language reflected on BellSouth Pre-filed Testimony of Pamela Tipton, Exhibit PAT-5.

E. **Issue 31: *Core Forbearance Order*:** *What language should be used to incorporate the FCC's ISP Remand Core Forbearance Order into interconnection agreements?*

Relevant Contract Provisions: BellSouth does not propose specific language on this issue.

The Commission should order that BellSouth resolve this issue on a carrier by carrier basis depending on the specific facts. To be clear, BellSouth is not attempting to avoid implementing the *Core Order* when it is appropriate to do so. BellSouth's specific concern with generic language on this issue is based on the choices available in the *Core Order,* which allow CLECs to elect different rate structures.[341] Due to these choices, a one-size-fits-all approach is inappropriate.[342] In addition, BellSouth has entered into specific carrier settlements implementing the *Core Order.*[343]

Notably, CompSouth is not proposing specific language either.[344] Thus, the only language before the Commission is the language proposed by ITC^DeltaCom, which suggests that BellSouth's template agreement should include language implementing the *Core Order.* However, as Ms. Tipton explained, parties still must identify their desired rate structure and including standard language would not address all scenarios encountered in the implementation of the *Core Order*.[345]

IV. Network Issues (6, 19, 23, 24, 26, 27, 28)

A. **Issue 6: HDSL Capable Copper Loops:** *Are HDSL-capable copper loops the equivalent of DS1 loops for the purpose of evaluating impairment?*

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[341] Tr. at 341.
[342] *Id.*
[343] *Id.*
[344] *See* First Revised Exhibit JPG-1, p. 63.
[345] Tr. at 383.

<u>Relevant Contract Provisions:</u> PAT-1 Section 2.3.6.1; PAT-2 Section 2.3.6.1

This issue, although written broadly, presents two questions that require Commission resolution, both of which relate specifically to BellSouth's UNE HDSL loop product, rather than to HDSL compatible loops generally. First, if in the future, BellSouth satisfies the FCC's impairment thresholds for DS1 loops, then the Commission should make clear that BellSouth has no obligation to provide CLECs with its UNE HDSL loop product. This is not a live dispute in South Carolina at present because BellSouth is not seeking DS1 loop relief. Second, the Commission should confirm that BellSouth can and should count each deployed UNE HDSL loop as 24 voice grade equivalent lines as directed by the FCC.

Concerning unbundling relief, BellSouth's position that CLECs are not entitled to order UNE HDSL loops in wire centers that satisfy the FCC's thresholds for DS1 loop relief is explicitly supported by the FCC's definition of a DS1 loop. The FCC defined a DS1 loop as including "2-wire and 4-wire copper Loops capable of providing high-bit rate digital subscriber line services, ***such as 2-wire and 4-wire HDSL Compatible Loops***."[346] The federal rule is incorporated into BellSouth's proposed interconnection agreement language, which is as follows:

> For purposes of this Agreement, including the transition of DS1 and DS3 Loops described in Section 2.1.4 above, DS1 Loops include 2-wire and 4-wire copper Loops capable of providing high-bit rate digital subscriber line services, such as 2-wire and 4-wire HDSL Compatible Loops.

BellSouth's language simply and appropriately implements the applicable federal rules, which, by their terms, extend unbundling relief to UNE HDSL loops in the same wire centers in which BellSouth is not obligated to provide CLECs with DS1 loops.

In attempting to circumvent the application of the federal rules, the CLEC witnesses ignore the FCC's definition of a DS1 loop, and cite to FCC language addressing HDSL capable

[346] 47 C.F.R. § 51, 319(a)(4); Fogle Rebuttal at 4 (emphasis supplied).

loops generally, rather than to the clear and unambiguous language contained in the rules.[347] The CLECs' contentions are misplaced, because, by defining DS1 loops as including a 2-wire and 4-wire HDSL loops, the FCC expressly removed any obligation to provide these loops in unimpaired wire centers. More importantly, however, the CLECs cannot refute the reality that there has been very little CLEC interest in BellSouth's UNE HDSL product at all, as only 358 UNE HDSL loops were in service to *all* CLECs in South Carolina as of August 2005.[348]

The second question posed by this issue relates to how UNE HDSL loops should be calculated in determinations of subsequent wire centers that satisfy the FCC's impairment thresholds. UNE HDSL loops can and should be counted as 24 business lines. In the *TRO* the FCC explained:

> We note throughout the record in this proceeding parties use the terms DS1 and T1 interchangeably when describing a symmetric digital transmission link having a total 1.544 Mbps digital signal speed. ***Carriers frequently use a form of DSL service, i.e., High-bit rate DSL (HDSL), both two-wire and four-wire HDSL, as the means for delivering T1 services to customers.*** We will use DS1 for consistency but note that a DS1 loop and a T1 are equivalent in speed and capacity, both representing the North American standard for a symmetric digital transmission link of 1.544 Mbps.[349]

The FCC has also made clear that, for the purposes of calculating business lines, "a DS1 line corresponds to 24 kbps-equivalents, and therefore to 24 'business lines.'"[350] Since the FCC has declared that a DS1 loop and a T1 are equivalent in speed and capacity, and since the FCC declared that UNE HDSL loops are used to deliver T1 services, it is obvious that BellSouth's UNE HDSL loops must be counted, for the purpose of determining business lines in an office, on

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[347] Tr. at 438 (Gillan Direct at 29).
[348] Tr. at 212.
[349] *TRO,* n. 634 (emphasis supplied).
[350] 47 C.F.R. § 51.5.

a 64 kbps equivalent basis, or as 24 business lines.[351] BellSouth's proposed contract language is fully consistent with the FCC's decisions and should be approved.

B. Issue 19: Line Splitting: *What is the appropriate ICA language to implement BellSouth's obligations with regard to line splitting?*

Relevant Contract Provisions: PAT-1 Section 3; PAT-2 Section 3

No CLEC witness provided any testimony concerning line splitting, which occurs when one CLEC provides narrowband voice service over the low frequency portion of a loop and a second CLEC provides xDSL service over the high frequency portion of that same loop and provides its own splitter.[352] Thus, although Mr. Gillan sponsored contract language concerning line splitting, the Commission can and should disregard such terms as lacking any evidentiary support.

In contrast, BellSouth's witness on this issue, Mr. Fogle, demonstrated the need for BellSouth's contract language, which involves a CLEC purchasing a stand-alone loop (the whole loop) and providing its own splitter in its central office leased collocation space, and then sharing the portion of the loop frequency not in use with a second CLEC.[353]

If the Commission chooses to compare the contract language despite CompSouth's lack of any evidentiary support, any such comparison should result in the adoption of BellSouth's proposed language. CompSouth includes language that would require BellSouth to provide line splitting on a commingled arrangement of a loop and unbundled local switching pursuant to Section 271; however, as explained above the Commission should not support the reincarnation of UNE-P and should not include any references to Section 271 in Section 251/252 interconnection agreements. Moreover, the loop described by CompSouth does not exist, is not required by the FCC, and, therefore, should not be included in the section of the ICA that addresses line splitting.[354]

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[351] Tr. at 210-211.
[352] *TRO* at ¶ 251; *Line Sharing Reconsideration Order* at ¶ 33; Gillan Deposition at 77 – 78.
[353] Tr. at 187-189.
[354] Fogle Rebuttal at 8.

CompSouth also proposes that BellSouth be obligated to provide splitters between the data and voice CLECs that are splitting a UNE-L; however, as Mr. Fogle made clear, splitter functionality can easily be provided by either an inexpensive stand-alone splitter or by utilizing the integrated splitter built into all Asynchronous Digital Subscriber Line ("ADSL") platforms.[355] The CLECs offered no contrary evidence. BellSouth should not be obligated to provide the CLECs with splitters when they are utilizing UNE-L and can readily provide this function for themselves.[356]

The final area of competing contract language concerns CompSouth's proposed OSS language. The dispute between the parties is not over the language contained in the federal rules – clearly, the federal rules require BellSouth to make modifications to its OSS necessary for line splitting. The dispute between the parties revolves around the modifications that are actually "necessary."

BellSouth cannot agree to the open-ended contract language that CompSouth has proposed. That language would create, rather than solve, issues between BellSouth and its CLEC customers. Since CompSouth has failed to explain in any detail the basis for its proposed language, the Commission should reject it and adopt BellSouth's language, which is clear and reasonable, in resolution of this issue.

C. Fiber and Broadband Unbundling:

1. Greenfield and Fiber To The Home

i. **Issue 23: Greenfield Areas:** *a) What is the appropriate definition of minimum point of entry ("MPOE")? b) What is the appropriate language to implement BellSouth's obligation, if any, to offer unbundled access to newly-deployed or 'greenfield' fiber loops, including fiber loops deployed to the minimum point of entry ("MPOE") of a multiple dwelling unit that is predominantly residential, and what, if any, impact does the ownership of the*

[355] Tr. at 215.
[356] Tr. at 215-216.

inside wiring from the MPOE to each end user have on this obligation?

ii. **<u>Issue 28: Fiber To The Home:</u>** *What is the appropriate language, if any, to address access to overbuild deployments of fiber to the home and fiber to the curb facilities?*

<u>Relevant Contract Provisions:</u> PAT-1 Sections 2.1.2, 2.1.2.1, 2.1.2.2, 2.1.2.3; PAT-2 Sections 2.1.2, 2.1.2.1, 2.1.2.2, 2.1.2.3

There is no dispute between BellSouth and CompSouth that the FCC has eliminated certain unbundling requirements concerning certain types of fiber loops.[357] Likewise, there is no live dispute between the parties concerning the MPOE definition (subpart (a) of Issue 23). Indeed, when comparing the parties' proposed contract language, there are only two substantive differences, one minor, one major. The first, and minor difference, is that CompSouth has deleted BellSouth's Section 2.1.2.3, which states:

> Furthermore, in FTTH/FTTC overbuild areas where BellSouth has not yet retired copper facilities, BellSouth is not obligated to ensure that such copper Loops in that area are capable of transmitting signals prior to receiving a request for access to such Loops by <<customer_short_name>>. If a request is received by BellSouth for a copper Loop, and the copper facilities have not yet been retired, BellSouth will restore the copper Loop to serviceable condition if technically feasible. In these instances of Loop orders in an FTTH/FTTC overbuild area, BellSouth's standard Loop provisioning interval will not apply, and the order will be handled on a project basis by which the Parties will negotiate the applicable provisioning interval

CompSouth did not offer any explanation for its deletion of BellSouth's proposed Section 2.1.2.3, hence, its deletion should be rejected by the Commission.[358]

The parties' major disagreement largely centers on the extent of fiber unbundling. The core dispute relates to the language that CompSouth substituted for BellSouth's proposed Section 2.1.2.3, which follows:

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[357] The Commission should be aware that Covad and other CLECs have filed petitions for reconsideration with the FCC of its *FTTC Reconsideration Order*. *See* FCC Docket Nos. 01-338, 96-98, 98-147, petitions for reconsideration filed on January 28, 2005.

[358] *See* SC TR at 220.

> Notwithstanding the above, nothing in this Section shall limit BellSouth's obligation to offer CLECs an unbundled DS1 loop (or loop/transport combination) in any wire center where BellSouth is required to provide access to DS1 loop facilities.[359]

CompSouth claims that its limitation is supported by the FCC's use of the terms "mass market" at various places in its orders; however, the language CompSouth has proposed does not appear in the binding federal rules, and should be rejected.[360]

In resolving this issue, the Commission needs to understand the FCC's various orders concerning fiber relief. The first order addressing fiber was the *TRO,* and the FCC stated at ¶ 273:

> Requesting carriers are not impaired without access to FTTH loops, although we find that the level of impairment varies to some degree depending on whether such loop is a new loop or a replacement of a pre-existing copper loop. With a limited exception for narrowband services, our conclusion applies to FTTH loops deployed by incumbent LECs in both new construction and overbuild situations. Only in fiber loop overbuild situations where the incumbent LEC elects to retire existing copper loops must the incumbent LEC offer unbundled access to those fiber loops, and in such cases the fiber loops must be unbundled for narrowband services only. Incumbent LECs do not have to offer unbundled access to newly deployed or "greenfield" fiber loops.

Although the FCC used the terms "mass market" at various other places in the *TRO,* it did not use those words in explaining the scope of its fiber relief, and the FCC was very clear that its "unbundling obligations and limitations for such loops do not vary based on the

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[359] *See* First Revised Exhibit JPG-1, p. 53. The Commission should not accept CompSouth's proposed language, as explained more fully below. If, however, the Commission entertained any aspect of CompSouth's language (it should not) and inserted a DS1 loop or DS1 EEL limitation, it should make clear that BellSouth would have no obligation to provide a DS1 loop or DS1 EEL provided over a FTTH or FTTC loop to a *residential customer.* Mr. Gillan conceded as much in his deposition (but subsequently reneged on this agreement during the Tennessee Hearing):

> Q: Would you agree that if, for some reason, a residential customer ordered a DS1 loop, that – and it's a Greenfield loop, that we would have no obligation to provide a DS1 loop in that circumstance?
>
> A: I'm going to give you a conditional yes, subject to checking the order in more detail. But I do believe that every time that the FCC referred to the enterprise market, it used the business enterprise market as part of the definition. So I think that that's an accurate statement.

Gillan Deposition at 81.

[360] *See* 47 C.F.R. § 51.319(a)(3).

customer to be served."[361] Indeed, the FCC recognized clearly that CLECs "are currently leading the overall deployment of FTTH loops after having constructed some two-thirds or more of the FTTH loops throughout the nation."[362]

The FCC extended its fiber relief in subsequent orders. In its *Order on Reconsideration, In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*,[363] the FCC made clear that BellSouth is not obligated to unbundle fiber loops serving predominantly residential multiple dwelling units ("MDUs").[364] The FCC also explained that, to the extent fiber loops serve MDUs that are predominantly residential in nature, such loops are governed by the FTTH rules.[365] "General examples of MDUs include apartment buildings, condominium buildings, cooperatives, or planned unit developments."[366] The FCC further stated that the existence of businesses in MDUs does not exempt such buildings from the FTTH unbundling framework established in the *TRO*. For instance, the FCC stated that "a multi-level apartment that houses retail stores such as a dry cleaner and/or a mini-mart on the ground floor is predominantly residential, while an office building that contains a floor of residential suites is not."[367] In its concluding paragraphs, the FCC acknowledged that its rule "will deny unbundling to competitive carriers seeking to serve customers in predominantly residential MDUs" but found that "such unbundling relief was necessary to remove disincentives for incumbent LECs to deploy fiber to these buildings."[368]

Following its *MDU Reconsideration Order,* the FCC next addressed the topic of fiber loops in its *Order on Reconsideration*, *In the Matter of Review of Section 251 Unbundling*

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[361] *TRO* at ¶ 210.
[362] *TRO* at ¶ 275.
[363] CC Docket No. 01-338, FCC 04-191 (Aug. 9, 2004) ("*MDU Reconsideration Order*").
[364] *MDU Reconsideration Order* at ¶ 7.
[365] *Id.* at 4.
[366] *Id.* at ¶ 4.
[367] *Id.*
[368] *Id.* at 23.

Obligations of Incumbent Local Exchange Carriers ("*FTTC Reconsideration Order*").[369] The FCC defined a FTTC loop is a "fiber transmission facility connecting to copper distribution plant that is not more than 500 feet from the customer's premises."[370] Then, the FCC granted further unbundling relief, concluding that "requesting carriers are not impaired in greenfield areas and face only limited impairment without access to FTTC loops where FTTC loops replace pre-existing loops."[371] Significantly, the FCC reiterated that CLECs have increased revenue opportunities available with FTTC loops and that the entry barriers for CLECs and ILECs were "largely the same."[372] The FCC again concluded that its rule modification "will relieve the providers of such broadband loops from unbundling obligations under section 251 of the Act."[373]

Despite all of these orders, CompSouth's proposed contract language would require BellSouth to provide access to its FTTH or FTTC DS1 loops or DS1 EELs. The Commission must reject this language as flatly contradictory to the FCC's broadband policies, its fiber orders, and the applicable rule.

BellSouth is aware of three state commission decisions that have addressed this issue in a manner consistent with BellSouth's position.[374] The Michigan Commission found as follows:

> The Commission finds that the Joint CLECs' proposal to include a limitation for the definition of FTTH, FTTC, and hybrid loops should be rejected. First, the Commission notes that there is no language within the FCC rule defining these loops that would so limit the definitions. Further, the Commission notes that in the *TRO,* the FCC stated that although it was adopting rules specific to each loop type, its determination concerning unbundling obligations and limitations for such loops do not vary based on the customer to be served. Therefore, the Commission is

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[369] CC Docket No. 01-338, FCC 04-248 at ¶¶ 1, 9 (Oct. 18, 2004).
[370] *FTTC Reconsideration Order* at ¶ 10.
[371] *Id.* at 11.
[372] *Id.* at 12.
[373] *Id.* at 32.
[374] BellSouth acknowledges that the Illinois Commerce Commission has reached a different conclusion. BellSouth also believes that the Florida Public Service Commission has adopted a reading consistent with its position; however, a written order has not yet been issued.

persuaded that the FCC did not create an ambiguity in its rules by not including the "mass market customer" limitation proposed by the Joint CLECs.[375]

The Massachusetts Department of Telecommunications and Energy reached a similar conclusion:

> CLECs argue that the FCC's intent to limit the unbundling relief to loops used to serve mass market customers can be found in the context of the relevant orders .... Although [CLECs are] correct that the FCC included its discussion of FTTH lops under the heading "Mass Market Loops," the FCC emphasized elsewhere in the *[TRO]* that while the FCC adopts loop unbundling rules specific to each loop type, our unbundling obligations and limitations for such loops do not vary based on the customer to be served. Therefore, the Department determines that the FCC did not intend to limit FTTP, FTTC, or FTTH unbundling relief only to those loops being used to provide service to residential customers.[376]

Finally, the Rhode Island Commission explained:

> To be even clearer, the definition of FTTH refers to 'customer premises' without any limitation as to the type of customer. In fact, in subsequent errata and reconsideration orders the FCC substituted previous references to 'residential' as relates to FTTH with more generic phraseology such as 'customer premises." This demonstrated that FTTH is not limited to residential customers, but encompasses business customers as well. In fact, the FCC had originally indicated in the TRO that its 'loop unbundling rules do not vary based on the customer to be served.[377]

In a final effort to flout the federal rules, CompSouth will likely argue that its Hearing Exhibit 5 – a brief the FCC filed ***after*** the *TRO* but ***before*** the issuance of its *MDU Reconsideration Order* and its *FTTC Reconsideration Order* – supports its proposed contract language. This argument has no merit.

The FCC stated, on appeal to the D.C. Circuit, that

> [t]here is not a hard-and-fast definition of whether a particular customer is a 'mass market' or an 'enterprise' customer; those categories are based on general

[375] *Michigan Order,* p. 6 – 7.

[376] *Massachusetts Arbitration Order,* p. 177.

[377] *Arbitration Decision,* In re: Petition of Verizon-Rhode Island for Arbitration of an Amendment to Interconnection Agreements with CLECs and CMRS Providers in Rhode Island to Implement the Triennial Review Order and Triennial Review Remand Order, Docket No. 3588, (November 10, 2005), p. 18.

> characteristics of the types of communications services customers typically demand and were used as descriptive tools to guide the analysis.[378]

Consequently, CompSouth has no legitimate basis to insert a limitation to the FCC's fiber relief. Likewise, the FCC confirmed that in the *TRO* it "found that CLECs would suffer no impairment without access to ILEC FTTH loops" because "ILECs face roughly the same costs in deploying fiber loops as CLECs, and therefore are not at a cost disadvantage"; "FTTH loops are still in the very beginning stages of deployment, so there is not a large embedded base of ILEC FTTH loops that gives ILECs a significant head start advantage"; and "CLECs are currently leading the overall deployment of FTTH loops after having constructed some two-thirds or more of the FTTH loops throughout the nation.[379]

BellSouth's proposed contract language is fully consistent with applicable FCC rules and orders and should be approved.

2. **<u>Issue 24: Hybrid Loops:</u>** *What is the appropriate ICA language to implement BellSouth's obligation to provide unbundled access to hybrid loops?*

<u>Relevant Contract Provisions:</u> PAT-1 Section 2.1.3; PAT-2 Section 2.1.3

Hybrid loops are defined in the federal rules, and BellSouth and CompSouth do not appear to contest that it is appropriate to include the language contained in such rules in interconnection agreements, whether that language is a shortened version of the rules, as BellSouth proposes, or the federal definition in its entirety.[380] Either alternative is acceptable. What is not acceptable is CompSouth's proposed language to require BellSouth to provide

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[378] Exhibit 5, Opposition Brief of the FCC to Allegiance TeleCom's Motion for Stay Pending Review at p. 6.

[379] *TRO* at ¶ 275.

[380] *See* PAT-1 and PAT-2.

access to hybrid loops as a Section 271 obligation.[381] As BellSouth has previously explained, the Commission should not include any Section 271 language in Section 252 interconnection agreements; thus CompSouth's proposed language should be rejected.

D. <u>Routine Network Modification Issues</u>

1. **<u>Issue 26:</u>** *What is the appropriate ICA language to implement BellSouth's obligation to provide routine network modifications*?

2. **<u>Issue 27:</u>** *What is the appropriate process for establishing a rate, if any, to allow for the cost of a routine network modification that is not already recovered in Commission-approved recurring or non-recurring rates? What is the appropriate language, if any, to incorporate into the ICAs?*

3. **<u>SC Specific Issue</u>:** (a) *How should Line Conditioning be defined in the Agreement? What should BellSouth's obligation be with respect to Line Conditioning?* (b*) Should the Agreement contain specific provisions limiting the availability of Line Conditioning to copper loops of 18,000 feet or less?* (c) *Under what rates, terms and conditioning should BellSouth be required to perform line conditioning to Revenue Bridge Taps?*

<u>Relevant Contract Provisions:</u> – PAT-1 Section 1.10 and 2.5; PAT-2 Section 1.10 and 2.5

BellSouth's proposed contract language refers to the applicable federal rules concerning routine network modifications ("RNM") to unbundled loop facilities.[382] The parties' dispute centers on the relationship between RNM and line conditioning, which is properly seen as subset of RNM.[383] CompSouth also improperly attempts to limit BellSouth's cost recovery to TELRIC rates, even if BellSouth performs work that it would not typically perform for its retail customers.

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381 Tr. at 220-221.
382 Tr. at 202.
383 *Id.* at 23-24.

The FCC has defined RNMs as "those activities that incumbent LECs regularly undertake for their own customers."[384] RNMs do not include the construction of new wires (*i.e.* installation of new aerial or buried cable).[385] The FCC, citing the United States Supreme Court, recognizes that BellSouth does not have an obligation to "alter substantially [its] network[] in order to provide superior quality interconnection and unbundled access."[386] Thus, an ILEC has to make the same RNMs to their existing loop facilities for CLECs that they make for their own customers.[387] As stated by the FCC,

> [b]y way of illustration, we find that loop modification functions that the incumbent LEC routinely performs for their own customers, and therefore must perform for competitors, include, but are not limited to, rearrangement or splicing of cable, adding a doubler or repeater, adding an equipment case, adding a smart jack, installing a repeater shelf, adding a line card, and deploying a new multiplexer or reconfiguring an existing multiplexer.[388]

The FCC described these and other activities that would constitute RNMs as the "'routine, day-to-day work of managing an [incumbent LEC's] network.'"[389]

The D.C. Circuit in *USTA II* interpreted the FCC's RNM requirements in the *TRO*. The Court's analysis is entirely consistent with BellSouth's position on this issue.

> The ILECs claim that these passages manifest a resurrection of the unlawful superior quality rules. We disagree. ***The FCC has established a clear and reasonable limiting principle: the distinction between a 'routine network modification' and a 'superior quality' alteration turns on whether the modification is of the sort that the ILEC routinely performs, on demand, for its own customers.*** While there may be disputes about the application, the principle itself seems sensible and consistent with the Act as interpreted by the Eighth Circuit. Indeed, the FCC makes a plausible argument that requiring ILECs to provide CLECs with whatever modifications the ILECs would routinely perform for their own customers is not only allowed by the Act, but is affirmatively demanded by § 251(c)(3)'s requirement that access be "nondiscriminatory.[390]

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[384] *TRO* at ¶ 632.
[385] *Id.*
[386] *TRO* at ¶ 630 (quoting, *Iowa Util. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997)).
[387] *TRO* at ¶ 633.
[388] *Id.* at 634 (footnotes omitted).
[389] *Id.* at 637.
[390] *USTA II*, 359 F.3d at 578. (emphasis added).

It is clear that, despite CLECs' attempts to distinguish line conditioning from RNM, the FCC draws no such line. In paragraph 643 of the *TRO*, the FCC stated that "line conditioning should be properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers."[391] The FCC went on further to state that "incumbent LECs must make the routine adjustments to unbundled loops to deliver services ***at parity*** with how incumbent LECs provision such facilities for themselves" and that "line conditioning is a term or condition that incumbent LECs apply to their provision of loops for their own customers and must offer to requesting carriers pursuant to their section 251(c)(3) nondiscrimination obligations."[392]

In its discussion of routine network modifications, the FCC expressly equated its routine network modification rules to its line conditioning rules in the *TRO*: "In fact, the routine modifications we require today are substantially similar activities to those that the incumbent LECs currently undertake under our line conditioning rules."[393] The FCC echoed these sentiments in paragraph 250 of the *TRO*:

> As noted elsewhere in this Order, we find that line conditioning constitutes a form of routine network modification that must be performed at the competitive carrier's request to ensure that a copper local loop is suitable for providing xDSL service.[394]

The Florida Commission recently addressed this issue, finding that BellSouth's RNM and line conditioning obligations were to be performed at parity.[395] Under this ruling, BellSouth is not obligated, to remove at TELRIC rates, load coils on loops greater than 18,000 feet.[396]

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391 *TRO* at ¶ 643.
392 *Id.* (emphasis added).
393 *TRO* at ¶ 635.
394 *TRO* at ¶ 250.
395 *See* Order No. PSC-05-0975-FOF-TP at 24 – 26.
396 *Id.* at 36 – 37.

Likewise, the Florida Commission held that BellSouth's obligation to remove bridged taps was to provide parity access.[397]

With respect to Issue 27, BellSouth's position is straightforward – if BellSouth is not obligated to perform a RNM, such as removing load coils on loops that exceed 18,000 feet or removing bridged taps, then the appropriate rate is not TELRIC, it is a commercial or tariffed rate.[398] In contrast, CompSouth's proposed language limits BellSouth's recovery to TELRIC rates, even if the activity the CLEC is requesting was not included in the establishment of that rate.[399] CompSouth, however, failed to provide any rationale or explanation for this limitation, and, the Commission must reject it. Indeed, as BellSouth makes clear, it has no objection to performing non-standard modifications if CLECs insist upon such changes – however, BellSouth is entitled to be fully compensated for doing so.[400]

BellSouth's proposed contract language is fully consistent with applicable FCC rules and should be approved.

CONCLUSION

This docket requires the Commission to make the decisions that will implement, not undermine, the decisions of the FCC. The FCC has already weighed evidence and considered legal arguments in deciding to de-list many UNEs. The FCC reached those decisions because the facts and law demonstrated that the old regulatory regime for UNEs was hindering the real competition Congress wanted to achieve. The bottom line is that the CLECs' 271 and UNE-P arguments fly in the face of the both the plain language of the federal Act and the plain language of numerous FCC Orders, federal court decisions, and state commission decisions that interpret

[397] *Id.* at 41.
[398] Tr. at (Fogle Direct at 28).
[399] Tr. at 225 (Fogle Rebuttal at 18).
[400] Tr. at 207 (Fogle Direct at 29).

and apply the Act. The FCC clearly did not intend to have its critical changes in telecommunications regulation ignored and to have business continue largely as before but merely under a different statute. No one can seriously contend that all of the FCC's work amounts to nothing more than changing the number from 252 to 271 in all of our briefs and petitions – but doing business the same as before. Instead it is clear that the FCC intends these decisions to get out of hearing rooms and to be made instead at the companies' negotiating tables.

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